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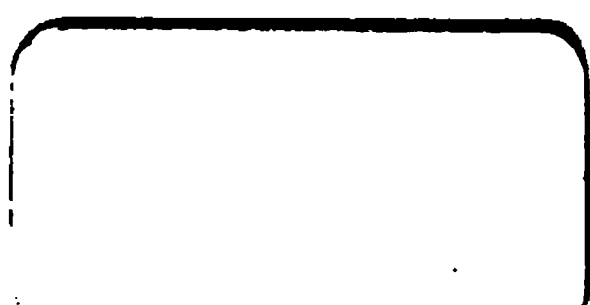
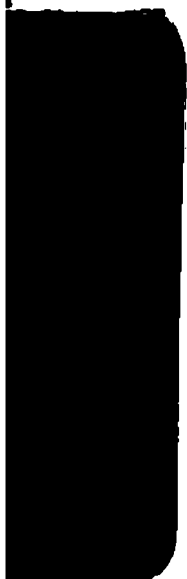
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THE
AMERICAN REPORTS:

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES.

WITH

NOTES AND REFERENCES

BY

ISAAC GRANT THOMPSON.

VOL. III.

CONTAINING ALL CASES OF ANY GENERAL IMPORTANCE IN THE FOLLOWING
REPORTS:

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6 NEVADA; 84 NEW JERSEY; 7 BUSH. (KY.); 101 MASSA-
CHUSETTS; 102 MASSACHUSETTS; 63 PENNSYL-
VANIA; 64 PENNSYLVANIA; 65 PENNSYL-
VANIA; 43 NEW YORK.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1872.

1 2 3 0 4 5

JUL 29 1942

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CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

BUCHANAN, appellant, v. CURTIS *et al.*

(25 Wis. 99.)

Dedication and acceptance of highway — Evidence.

The plaintiff constructed a road through his own land, which he permitted the public to use freely for two or three years, and subsequently closed it by fences. In an action against the pathmaster for removing the fences, it was *held* that, where the intention of the owner to dedicate the road to the public is evident, no formal or official acceptance is requisite to constitute a highway by dedication. Evidence of the declarations of the owner explanatory of his intentions, both before and after the opening of the way, is admissible.

TRESPASS. Appeal from the Columbia county circuit court.

Buchanan, the plaintiff, owned a tract of land through which a road was constructed at his expense. This was in and near the village of Rio, and building lots had been laid out along the line of the road. This road was largely used by the public from 1865 to 1867 or 1868, when plaintiff closed it by fences. The pathmaster, Curtis, and his assistants removed the fences and re-opened the way to the public. The road had never been officially recognized or worked by the town. An action of trespass, *quare clausum*, was brought against the pathmaster. Evidence of the declarations of the plaintiff as to his intentions subsequent to the opening of the way was excluded. The court gave certain instructions asked by the plaintiff, but refused to charge the jury that an acceptance of the road by the public, to be valid, must be "by some proper authority," or "by the

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town or road authorities, by the expenditure of labor upon the road, or in some other manner." It further instructed them that if plaintiff had unequivocally declared, by his words or acts, or both, that he intended to relinquish to the public the right of traveling on this road, and the public did in fact use it in such a manner as to show their purpose to use it as a highway, then it was a highway; that upon the question whether plaintiff, "by his declarations and acts, showed an intention to give the road as a permanent public highway at the time of cutting it out," or induced the public to believe that he so intended, they must find as they believed from all the testimony.

Verdict for defendants; denial of motion for new trial; appeal from judgment on verdict.

I. Holmes and G. C. Prentiss, for appellant.

Cook & Chapin and Emmons Taylor, for respondents.

DIXON, C. J. This court is divided in opinion upon the question whether an acceptance by the officers of the town is necessary to constitute a highway by dedication. My brethren are of opinion that such acceptance is not necessary, but that travel by the public, to such an extent and for such a length of time as to show that the public convenience and accommodation require the road, is sufficient for that purpose. In support of this proposition they cite and rely upon the following authorities: *Hanson v. Taylor*, 23 Wis. 547; 21 N. Y. 474; 23 id. 64; 26 Barb. 634; 23 id. 123; 5 Bing. 477 (13 E. O. L. 45); 36 Penn. St. 99; 20 id. 331; 46 N. H. 192; 19 Conn. 250; 29 id. 162. On the other hand, I hold that acceptance by the proper officers of the town is necessary, and that mere travel or user by the public will not suffice for the purpose. I refer to my opinion in *Hanson v. Taylor*, and the authorities there cited, which, for convenience of reference, I here repeat: *State of Wisconsin v. Joyce*, 19 Wis. 90; 18 id. 118, 129; 21 id. 609; 19 Johns. 186; 6 N. Y. 257; 14 Barb. 228; 16 id. 251; 37 id. 50; 36 Vt. 587; 27 id. 294; 13 id. 224; 14 id. 288; 19 Pick. 405; 3 Cush. 290; 4 id. 382; 8 Gratt. 632; 2 Carter (Ind.), 147; 33 Miss. 289; 29 Conn. 168; 1 Beasley (N. J.), 299; 2 R. L. 172. And if mere user by the public is, under any circumstances, to be regarded as an acceptance or evidence of an acceptance so as to bind the town, which I do not admit to be law.

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in this State, I should still differ from my brethren as to the length of time of user required. I think, to be sufficient, it must be long user—twenty years at the common law, and ten years under our statute. R. S., ch. 19, § 85. And this I understand to have been expressly decided in several of the cases above referred to, while some others, it is freely admitted, seem to hold a different rule. I refer particularly to 46 N. H. 192, and authorities there cited, as showing the common-law rule upon this point; and also the rule which should be held under our statute in case the doctrine of acceptance by user is to prevail in this State. And I refer likewise to 1 Beasley, 299, upon the same point.

These remarks sufficiently dispose of all questions arising upon the instructions given, and those requested but not given. They show, that, in the opinion of the majority of this court, there was no error in either respect, while I am of the very opposite opinion.

But this case presents another question, upon which there is no division of opinion in this court. The court below refused to allow the declarations of the plaintiff, made after the way was opened, and after the alleged dedication, to go to the jury as evidence of the plaintiff's intention. Proof of such declaration, made at the time of the alleged dedication only, was admitted. This, we think, was error. It was expressly so ruled in *Proctor v. Town of Lewiston*, 25 Ill. 153; and *Irwin v. Dixon*, 9 How. (U. S.) 10, is a very strong case to the same effect. In the latter case, the right of public way, claimed after a user of nearly fifty years by the public, was defeated by evidence of such declarations. Such declarations are a part of the *res gestæ*. Both the acts and declarations of the owner explanatory of his intention in permitting the public to use his land may be shown; and, if it appears that there was no intention to dedicate, then the public acquires no title by the user.

It follows that the judgment must be reversed, and a new trial awarded.

New trial awarded.

Knorr v. The Home Insurance Company of New York.

KNORR v. THE HOME INSURANCE CO. OF NEW YORK, appellant.

(25 Wis. 143.)

• *Foreign corporations — Removal of cause to federal courts.*

A non-resident insurance company doing business in a State, and accepting service of original process through its agents, in conformity to the laws of the State, is not thereby deprived of the right to a removal to the federal courts of an action commenced against it in the courts of the State by a citizen..

APPLICATION for transfer of a cause to United States court.

This action was commenced in the Sheboygan county circuit court in March, 1868, for the recovery of \$1,075 due the plaintiff from The Home Insurance Company of New York, and service of the summons was accepted by Jones, the agent and attorney of the company, in compliance with a law of the State, who afterward applied for a transfer of the cause to the United States court.

The petition was resisted on the ground that defendant, by complying with the laws of this State regulating proceedings against such companies, had lost its non-residence, and become a domestic corporation *pro hac vice*.

The application being denied the defendant appealed.

J. W. & A. L. Cary, for appellant.

Joseph Wedig and E. Fox Cook, for respondent.

COLE, J. This is an application on the part of the defendant company for an order directing that this cause be removed to the circuit court of the United States for the district of Wisconsin for trial. The application seems to be regular and in conformity to the law of congress upon that subject. The petition states that the defendant "is, and for more than two years last past hath been, a corporation created by, organized and existing under, the laws of the State of New York, having its principal business office in the city of New York, and is a citizen of the State of New York," and that the plaintiff is a citizen of this State.

A re-argument of the cause was ordered at the last term, upon

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the point, whether the defendant, by complying with the laws of this State regulating foreign insurance companies, did not, to a certain extent, lose its citizenship, and become a domestic corporation, so that the circuit court of the United States for this district could not take jurisdiction of the cause. In our examinations our attention was called to the cases of *Stevens v. The Phoenix Insurance Company*, 24 How. Pr. 517, and *New York Piano Co. v. New Haven Steamboat Co.*, 2 Abb. Pr. (N. S.) 358, where quite analogous questions were raised and considered. In *Stevens v. The Phoenix Insurance Company*, Mr. Justice ALLEN, at special term, gave quite an elaborate opinion, upon a motion by the defendant to remove the cause to the circuit court of the United States for the northern district of New York, upon the ground that the plaintiff was a citizen of the State of New York, and the defendant was a corporation created by the laws of Connecticut, and located and doing business in that State. And he held that a foreign insurance company, created by the laws of another State, but doing business in New York, under and in compliance with the laws of that State, upon being sued by a citizen of New York, could not remove the cause into the federal courts on the ground that it was a citizen of another State within the meaning of the clause of the constitution which confers jurisdiction upon the courts of the United States by reason of the citizenship of the parties. He states in substance, as a reason for this conclusion, that while a foreign corporation cannot migrate or have any extra-territorial existence by force of the law creating it, yet it may, by the comity of other States, transact business in such States, establish agencies therein, sue and be sued, etc.; and that when a corporation did avail itself of this comity, and of privileges thus conferred, in respect to the transaction of business, as to the business thus transferred it lost its citizenship, and became to that extent a citizen of the State under whose laws it transacted its business, and of whose governmental protection it availed itself. Another reason is given, that the company, by consenting to do business under and by authority of the laws of New York regulating foreign insurance companies, submitted itself to the jurisdiction of the courts of that State.

In the case of *The Piano Company v. New Haven Steamboat Company*, ROBERTSON, C. J., held, that a corporation will not be deemed a non-resident of that State, although chartered by the laws of another State, if it has a regular place of business within the State

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in which the action is pending, and has there an agent upon whom, by law, process may be served, and who has agreed to admit service of process. He held that the locality where the principal part of its business is done, and where it exercises those functions of a corporation in the mode in which its existence is actually made known to the public, furnishes the best test to determine the citizenship of a corporation.

The reasoning of both these cases is fully met and quite satisfactorily answered in the cases of *Dennistoun v. New York & New Haven R. R. Co.*, 1 Hilt. 62, and *Fisk v. The Chicago, Rock Island & Pacific R. R. Co.*, 3 Abb. Pr. (N. S.) 454. And if one concedes the validity of the twelfth section of the judiciary act, and adopts the rule laid down in the more recent decisions of the supreme court of the United States in respect to the criterion by which the citizenship of a corporation is to be determined, for the purposes of jurisdiction, the doctrine of these cases last cited would seem to rest upon the better grounds. For it is difficult to perceive why a different result should follow in case of a foreign corporation doing business through agents in another State, even though such agents might be authorized to acknowledge service of process on behalf of the corporation, than in case of a natural person. It is very manifest that a citizen of another State might transact business here through his agents and still remain a non-resident. And if he should happen to be sued while temporarily within the jurisdiction of our courts, the fact that he was transacting business in the State would not probably be relied on to show that he had lost the right to transfer the cause to the federal courts. It is very true that a foreign insurance company, on complying with our laws upon that subject, is permitted to take risks and transact the business of insurance in this State. That is, it is permitted to exercise here the powers conferred upon it by the State which incorporated it. But it transacts this business by means of agencies, as a non-resident person would do. The corporation is, however, not created by the law of this State. This State merely recognizes it as an already existing corporation, authorized by the sovereignty which created it to transact the business of insurance. And it is very apparent that the defendant corporation was organized and created by the law of New York, and not by the law of this State. That State alone confers upon it whatever powers it possesses under its charter. That State may at any time withdraw that charter, or otherwise

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dissolve the corporation, and, from the time it should do so, the corporation would cease to exist. It would no longer have the right to transact business of insurance in this State. These considerations clearly show that our laws relating to foreign insurance companies do not confer upon such companies any corporate powers, or render them domestic corporations. These laws do not, in any manner, attempt to create such corporations, and are only intended to regulate them and prescribe upon what conditions they may do insurance business in the State. Nor does the fact that they are required to have agents here, who are authorized to acknowledge service of process for and on behalf of the company, affect the question of their citizenship or render them domestic corporations. This is evidently a provision to relieve our citizens from the necessity of resorting to the courts of the State which creates the corporation to enforce their contracts. They may pursue their legal remedies against such corporations in our own courts, the means and way having been provided for obtaining jurisdiction over them. But this does not deprive the company of the right, conferred upon it by the judiciary act, to apply to have the cause removed from the State court to the federal courts. And touching the question of the jurisdiction of the federal courts by reason of the citizenship of parties, the more recent doctrine of the supreme court of the United States is, that a suit by or against a corporation, in its corporate name, is to be regarded as a suit by or against a citizen of the State which created the corporation. *Ohio & Miss. R. R. Co. v. Wheeler*, 1 Black, 286. Within that rule the defendant is undoubtedly to be treated and regarded as a citizen of the State of New York. As stated by the chief justice, in the case of *Moseley v. Chamberlain*, 18 Wis. 700, I have always been of the opinion that congress has no power to provide for the removal of a cause from a State to a federal court, and, consequently, that the twelfth section of the judiciary act is invalid. I shall not, however, attempt to give any reasons for that opinion at this time. Suffice it to say, as that opinion was maturely formed after all the examination and reflection I could bestow upon the question, it remains unchanged. But my adhering to that opinion now would be of no earthly advantage, that I can see, to any person or any principle. On the contrary, it would only be productive of great embarrassment, trouble and expense to these parties and others similarly situated. For we well know that the supreme court of the United States, in the

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exercise of that jurisdiction which it assumes, would pronounce all the proceedings in the State court, after the application for removal was made, as *coram non judice*.

I have, therefore, concluded to hold, with the chief justice, that the order of the circuit court must be reversed, and the cause remanded, with directions to grant the order of removal.

Order granted.

PAINE, J., dissented.

**WHITING, appellant and respondent, v. THE SHEBOYGAN AND
FOND DU LAC RAILROAD COMPANY *et al.***

(25 Wis. 187.)

Constitutional law — taxation in aid of railroads.

Taxation in aid of railroads owned and operated by private individuals or corporations is unconstitutional, and an act of the legislature authorizing county orders to be issued in aid of a railroad, and taxes to be levied for the payment thereof, on condition that the consent of the majority of the people should be manifested by ballot, and the railroad should be brought to a specified state of completion, is void.

INJUNCTION to restrain county aid to a railroad.

The plaintiff, Whiting, being a resident and tax payer of the county of Fond du Lac, brought suit in May, 1867, against the board of supervisors of the county, the Sheboygan and Fond du Lac Railroad Company, and others, to restrain proceedings under an act of the legislature of 1867 (Private and Local Laws, ch. 448), by which the supervisors had been authorized (on condition that the majority of the people should vote in the affirmative, and the road should first be partially constructed) to issue county orders for the benefit of the Sheboygan and Fond du Lac railroad (and another) and levy taxes on the whole county for the payment of the orders when due. The county was not a stockholder; the company was private and subject to certain statutory regulations.

The plaintiff averred that the county was about to render, and the company about to receive, such aid, and prayed for an injunction. A temporary injunction was granted May 19, 1868. The

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defendants moved to dissolve this injunction, and the motion was denied November 12, 1868. Defendants appealed. The cause came to trial, and judgment was rendered in favor of defendants January 19, 1869, from which the plaintiff appealed. Both appeals were argued together, the main question being the legislative power to authorize taxation in aid of railroads.

Bennett & Norcross and Conger & Sloan, for plaintiff.

1. Private property cannot be taken for any other than a public use, and cited: *In re Albany street*, 11 Wend. 149; *Bloodgood v. M. & H. R. R. Co.*, 18 id. 59; *In re John and Cherry streets*, 19 id. 659; *Varick v. Smith*, 5 Paige, 137; *Taylor v. Porter*, 4 Hill, 147; *Embury v. Connor*, 3 Comst. 511; *Symonds v. City of Cincinnati*, 14 Ohio, 147; *Bradley v. R. R.*, 21 Conn. 294; *Dunham v. Williams*, 36 Barb. 136; *Pratt v. Brown*, 3 Wis. 603; *Reeves v. Treasurer of Wood Co.*, 8 Ohio, 344; *Cooley's Const. Lim.* 530.

2. Private property cannot be taken for public use unless on condition of making full and money compensation, and cited, *Const. of Wis.*, art. 1, § 13, ordinance of 1787, art. 2; *Cooley on Const. Lim.* 559; *Fletcher v. Peck*, 6 Cranch, 145; *Bradshaw v. Rogers*, 20 Johns. 103; *The People v. Mayor, etc., of Brooklyn*, 4 N. Y. 419; *Carson v. Coleman*, 3 Stock. 106; *United States v. Minn., etc., R. R. Co.*, 1 Minn. 127; *Railroad Co. v. Ferris*, 26 Tex. 603; *Curran v. Shattuck*, 24 Cal. 247; *State v. Graves*, 19 Md. 351; *Bennett's Shelford on Railways*, 441; *Reitenbaugh v. R. R. Co.*, 21 Penn. St. 100; *Robbins v. Railroad Co.*, 6 Wis. 636; *Shepardson v. R. R. Co.*, id. 605; *Norton v. Peck*, 3 id. 714, 722, 723; *Powers v. Bears*, 12 id. 213; *Newell v. Smith*, 15 id. 101; *Philadelphia Asso. v. Wood*, 39 Penn. St. 73.

3. The vote of the majority does not alter the invalidity of the tax, and cited: *Town of Guilford v. Chenango Co.*, 3 Kern. 143.

4. Even the right of eminent domain cannot be exercised except in cases of necessity, much less the power of taxation, and cited: *Jordan v. Woodward*, 40 Me. 317; *Eldridge v. Smith*, 34 Vt. 484; *Lancs's Appeal*, 55 Penn. St. 16; *West River Bridge Co. v. Dix*, 6 How. (U. S.) 545, 546; *Gordon v. Railway Co.*, 2 Railway Cas. 809.

J. A. Bentley and Matt. H. Carpenter, for defendants:

1. The power of the legislature to authorize taxation in aid of railways is well settled, and cited: *Bridgeport v. R. R. Co.*, 15 Conn.

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475; *Sharpless v. Mayor of Philadelphia*, 21 Penn. St. 148; *Thomas v. Allegheny Co.*, 7 Law Reg. 92; *Talbot v. Dent*, 9 B. Mon. 526; *Cheaney v. Hooser*, id. 330; *Slack v. Maysville*, 13 id. 1, 30, 31; *Goddin v. Crump*, 8 Leigh. 120; *Nichal v. Nashville*, 9 Humph. 252; *Railroad Co. v. Clinton Co.*, 1 Ohio St. 77; *Stubenville, etc., R. R. Co. v. Township*, id. 105; *Cass v. Dillon*, 2 id. 607; *Shaw v. Dennis*, 5 Gilm. 405; *Ryder v. Railroad*, 13 Ill. 516; *Strickland v. Railroad*, 21 Miss. 209; *Dubuque Co. v. D. & P. Railway*, cited in Redf. on Railw. 534; *V. S. & T. Railroad v. Ouachita*, La. Ann. 649; *Parker v. Scogin*, id. 629; *People v. Brooklyn*, 4 Comst. 419; *Bushnell v. Beloit*, 10 Wis. 195; *Clark v. Janesville*, id. 136; *Hasbrouck v. Milwaukee*, 13 id. 37; 17 id. 266; *Dean v. Madison*, 9 id. 402.

2. The courts have no right to impose limitations on the taxing power, and cited: *People v. Brooklyn*, 4 N. Y. 428; *Wynhamer v. The People*, 13 id. 429; *People v. Draper*, 15 id. 532; *People v. Mahany*, 13 Mich. 500; *Sharpless v. Mayor, etc.*, 21 Penn. 147; *Cooley's Const. Lim.*, 168, cases cited in note *a*.

3. All roads are post roads, according to congressional enactment.

4. Analogous cases were cited: *Couch v. Ulster Turnpike Co.*, 4 Johns. Ch. 26; *Turnpike Co. v. Bishop*, 11 Vt. 198; *Turnpike Co. v. Baker*, 4 Humph. 415.

At the June term, 1869, DIXON, C. J., filed an opinion which was concurred in by COLE, J., and which reversed the judgment appealed from, and affirmed the order refusing to vacate the injunction. On motion of defendants for a rehearing, the following opinion was delivered at the January term, 1870:

DIXON, C. J. The arguments on this motion for a rehearing have been most thorough and able, and if this court is still in error upon the question involved, it can certainly never be said that it was any fault of counsel. For the power of taxation here claimed, and against our decision with respect to it, the argument has taken a wide range, and nothing seems to have been omitted which could, by possibility, give strength to the position of the learned counsel on that side, or show the views of the court to have been erroneous. The authorities have been cited almost to the end of the list of those supposed to sustain the position of the counsel, and quotations have been extensively made from them, while no pains have been spared to elucidate and apply them to the case in hand, with all that learn-

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ing and ability for which the counsel are so justly distinguished. With time for the investigation, so as not to interfere with the performance of other duties, we have endeavored to profit by those labors of counsel, and have given the question that careful and patient study and consideration which its importance demands. We are now prepared to restate our views, and more especially with reference to the positions taken by counsel in support of this motion, more fully and at large than on the former occasion.

And first, as to the cases in this court, from the opinions in which counsel quote so largely, and upon which they rely so confidently, it seems hardly necessary to add to our former remarks. Those cases are as clearly distinguishable from this as ever one case was from another. They were all cases of taxation for the direct and immediate benefit of the public—to improve a harbor, which was public property—to save from destruction the streets and site of a populous town, also public property—and to secure soldiers to protect and defend the country in time of war, always recognized as a public object of the greatest magnitude and importance. With these objects in view, it seems very strange that the language of the court should be severed entirely from the facts of the case before it, and the attempt be made to apply it to a wholly different state of facts, where the object of the tax is to promote a strictly individual enterprise, and to add to or enhance the value of merely private property. And particularly does this seem strange when the power to tax for any private purpose was expressly denied in the opinions. Such mode of interpreting and applying judicial opinions is well known to be unauthorized. It is a mode of misconstruing them, against which, when counsel are so disposed, it is impossible for any court to guard or protect itself. When, therefore, it was said in those cases that any, the slightest, public interest or benefit would sustain a tax, such statement is to be considered in connection with the facts of the case upon which it was made, and when it appears, from those facts, that the interest or benefit spoken of was the direct and immediate interest or benefit of the public to be promoted by the work, and not such as would incidentally or remotely accrue to the community at large from the accomplishment of it, it is to such direct and immediate public benefit and interest that the statement is to be applied, as much as if it had been expressly so limited. This is a familiar rule of construction, and one which cannot be departed from by counsel with safety to suitors or with justice to the court.

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It is a rule which excludes all such unfounded inferences as that attempted to be drawn here. The court in those cases being called upon to define what direct and immediate public interest or benefit would sustain a tax, did so in the language quoted. The question whether a public benefit or interest of some different kind, as that which is indirect or incidental to the prosecution of some enterprise or business of a private character, would sustain a tax, was not then before the court, nor was the court required to consider it or to expressly qualify its language with reference to it. The language of the opinions, and every word in them, stand qualified and limited by the proper subject-matter of the cases under consideration, and, thus understood, we have nothing to add to or take from them, and acknowledge our obligations when the learned counsel commend them as perfectly sound expositions of the law. We, too, believe them to be correct, and not in the smallest degree inconsistent with what has been here decided.

Again, it is said that every case in which the exercise of the power of eminent domain in behalf of one of these private railroad companies has been upheld is an authority clear and positive against the decision now made. The correctness of this conclusion depends upon the correctness of the premises from which it proceeds. It is assumed, as the foundation, that that which is a public use so as to justify the exercise of the power of eminent domain, is also a public use which will, under all circumstances, justify the exercise of the power of taxation. It is assumed that no difference exists in public uses, but that all are alike, and that a public use once established, with respect to one of these powers, is necessarily a public use with respect to the other. And this we think to be the great mistake upon this point. It arises from considering two things alike which are in reality different. It ignores all distinction between different public uses, and the effect which such differences may have in determining the legislative authority. That public uses differ very widely from each other is a proposition which no one can deny. They differ in nature and kind, and in the degree or extent of the public enjoyment. There may be various degrees of the same kind of public use. It may be more extensive and complete in one case than in another. Certain uses are, *per se*, public, such as of public highways, public buildings, and the channels of public rivers. Others have been declared public by the decisions of the courts, as of railroads, turnpike roads, public ferries, toll-bridges, and the like.

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But these last have as yet been declared public only with respect to the power of eminent domain.

Now, as there exists this variety and difference of public uses, the question arises whether, in the case of this railroad company, a distinction is to be taken between a public use which will authorize the exercise of the power of eminent domain, and one which will justify a resort to the power of taxation to promote the same object. And we think that there is such distinction. These powers are not identical, though both must be exercised for a public purpose, or not at all. There are many public uses for which taxes may be levied that have not as yet been held to authorize the condemnation of private property, though suitable or convenient for the same public uses. Taxes may be levied to build a State capitol, court-houses, public school buildings, jails, a State prison, an asylum for the insane, etc., but recourse to the power of eminent domain to obtain the land upon which to erect such buildings would be something new in the legislative and judicial proceedings of this country. "Who ever heard," says Mr. Justice WOODBURY, in *West River Bridge Company v. Dix*, 6 How. (U. S.) 546, "of laws to condemn private property for public use, for a marine hospital or State prison? So a custom-house is a public use for the general government, and a court-house or jail for a State. But it would be difficult to find precedent or argument to justify taking private property, without consent, to erect them on, though appropriate for the purpose." But it may be said that this difference only exists by reason of the greater public necessity required to justify the exercise of the power of eminent domain, and that it shows that the power of taxation is the more general and extensive of the two. Be it so. We only refer to it for the purpose of showing that such difference does or may exist in particular cases, and, when that is shown, the fact that there may be other differences in other cases, and which may lead to other conclusions, seems altogether less improbable.

As has already been said, we think there exist a difference here, and that it is such that, though the power of eminent domain may be exercised, yet the power of taxation, as here claimed, cannot be. And in order to understand this, it will be necessary to precisely ascertain and define the nature and extent of that public use which, in the case of these private railroad companies, has been held sufficient to authorize the exercise of the power of eminent domain in

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their behalf. And first, let us rid the question of some considerations which, for want of proper care and attention, have too often been most erroneously supposed to enter into it. Of such considerations, the principal and most important one is, that the public use which justifies the exercise of the power, in some way consists in the general benefits and advantages accruing to the public at large from the creation and operation of these works of internal improvement. It is very clear that the public use does not in any manner consist of these, for if it did, then every enterprise or business prosecuted for private gain or emolument, and by which the public prosperity and welfare is also promoted, would be a public use, and, as such, would justify the exercise of the power of eminent domain in behalf of the persons and corporations so engaged, and, according to the doctrine of those who differ from us in opinion, likewise the power of taxation, to donate money and property to such persons and corporations. There are very many enterprises and occupations of a private character, connected with trade, commerce and manufactures, which are quite as much to our advantage as a people, and quite as necessary and indispensable to our growth and prosperity as a nation, as the building and operating of railroads, and some are even more so. Senator Maison, in that part of his opinion quoted by counsel in support of this motion, after dilating upon the great public advantages afforded by the introduction of railroads, says: "Next to the moral lever power of the press should be ranked the beneficial influence of railroads in their effects upon the vast and increasing business relations of the nation, and the promoting, sustaining and perpetuating of the happiness, prosperity and liberty of the people." *Bloodgood v. M & H. R. R. Co.*, 18 Wend. 48.

Here then we have, in the leading authority cited and relied upon by the learned counsel, the admission, the truth of which no one can dispute, that there are private business occupations in which the people at large are more deeply interested, and by which they are more greatly benefited, than by the building and operating of railroads, and if the benefits and advantages accruing to the public from the latter, while in the hands of private corporations, and used and operated for the sole gain and emolument of the stockholders, constitute a public use which will justify a resort to the power of taxation for the sake of giving the money to such corporation, why shall we say that the benefits and advantages derived by the public from

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the former will not sustain the same proceedings, in order to donate the funds to the persons or corporations whose time and capital are thus beneficially employed therein? Who shall say that the power of eminent domain may not be exercised, and taxes levied for the encouragement and support of the newspaper and periodical press of the country? Who shall say that donations and benevolences, drawn from the pockets of the people by taxation, may be given to the champions of the New York and Erie railroad, and that they may not be given to the Harpers or the Appletons? Who shall set Franklin square against Wall street, and claim that taxes may be levied to give to the latter but not to the former? The majority of this court has decided that, upon considerations like these, taxation cannot be resorted to for either purpose, and to that decision it is proposed to adhere until some more satisfactory ground for discrimination can be shown than has yet been made to appear. It is obvious, if public benefits and advantages of this kind, and which may be properly called incidental, constitute a public use which will justify a resort to either of these sovereign powers of government, that when all distinction between public and private business, and public and private purposes, is obliterated, and the door to taxation is opened wide for every conceivable object by which the public interest and welfare may be directly or in anywise promoted. Such a doctrine would be subversive to all just ideas of the powers of government and destructive of all rights of private property, leaving every man's estate to be held by him as a mere grace or favor received at the hands of the legislative body. And such is the consequence of looking to these incidental public benefits and advantages as *the* public use which will justify the exercise of these high governmental powers; and those gentlemen who, like Senator Mason and others, have, in words of studied eloquence, labored to depict such benefits and advantages, thinking that they were thereby demonstrating that such legislation was justifiable, were never more mistaken. The same eulogies might, and with equal or more truth, be applied to the press, to domestic manufactures, and to many other things by which the general happiness and prosperity of the people have been equally or more greatly promoted.

The incidental public benefits or advantages, though in a general sense to be considered, do not, therefore, constitute, in the sense of the law, a public use, which will justify the interference of the government; and the question is, in what does such use consist in the

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case of these railroads owned and operated by private corporation? We have seen that certain uses, are *per se*, public, and that others have been pronounced so by the courts, and among the latter, railroads. Eminent domain is the right of the government to seize private property for public use, upon payment of just compensation to the owner. It is a power which must be exercised by the government or sovereign, and for the public use only. It cannot be delegated. "The *public use*," says Judge COOLEY, in his excellent treatise on Constitutional Limitations, 531, "implies a possession, occupation and enjoyment of the land by the public or public agencies." And further on, in commenting upon the same subject, Judge COOLEY notices the broad language of Chancellor WALWORTH, in *Beekman v. Saratoga & Schenectady R. R. Co.*, 3 Paige, 73, and which is quoted and made emphatic by counsel here, that, "if the public interest can be in any way promoted by the taking of private property," the taking can be considered for a public use. He observes, what must be obvious to every one who has thoroughly considered the subject, that it would not be safe to apply with much liberality this language of the learned chancellor. We refer to this definition of that learned writer, as being the most clear, concise and correct general definition of what constitutes the public use which justifies the exercise of the power of eminent domain that has anywhere fallen under our observation. It appears, then, that the *public use* consists in the *possession, occupation and enjoyment of the land itself by the public, or public agencies*, and not in any incidental benefits or advantages which may accrue to the public from enterprises of this nature. But the question before us calls for a more precise definition as to how it is that the public may be said to possess, occupy and enjoy the land condemned for the use of these railroad companies. And here again we must refer to the opinion of Mr. Justice WOODBURY, whose clear ideas and firm grasp of legal truths seem never once to have forsaken him. In the case first above cited, after speaking of certain uses which could not be deemed public, so as to justify the application of the principle of eminent domain, and specifying some of those things which are necessary to constitute a public use of a toll-bridge, turnpike or railroad, he says, in addition, that it "*must be under public regulations as to tolls, or owned, or subject to be owned, by the State*, in order to make the corporation and object public, for a purpose like this." And, as was customary with him, he cites

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many authorities to the point, and then proceeds: "It is not enough that there is an act of incorporation for a bridge, or turnpike, or railroad, to make them public, so as to be able to take private property constitutionally without the owner's consent; but their uses and objects, or interests, must be what has just been indicated—must, in their essence, and character, and liabilities, be public within the meaning of the term 'public use.' There may be a private bridge, as well as a private road or private railroad, and this with or without an act of incorporation." And Chancellor WALWORTH, in *Beekman v. Saratoga R. R. Co.*, 3 Paige, 75, likewise states the true nature of the public use, when he puts it on the ground that "the legislature may, *from time to time, regulate the use of the franchise, and limit the amount of toll which it shall be lawful to take*, in the same manner as they may regulate the amount of tolls to be taken at a ferry, or for grinding at a mill, unless they have deprived themselves of that power by a legislative contract with the owners of the road." And in the leading case of *Railroad Co. v. Chappell*, 1 Rice, 398, cited by Judge WOODBURY, and likewise by counsel here, it is said, that a railroad to be deemed a highway should be *kept under public control*. The public use, therefore, which has been held to justify the application of the doctrine of eminent domain in the case of these railroads owned and operated by private individuals, consists in the fact that the owners cannot, without reasonable excuse, refuse to receive and transport passengers and freight when offered at usual rates, and in the fact that *the State retains the power to regulate and control the franchise, and limit the amount of tolls which it shall be lawful for the owners to charge*. The use consists in these facts, and these alone. And as a man may be said to possess and enjoy the estate of another, the use of which by that other he may regulate and control, so that it shall not be turned to his detriment or disadvantage, so the public, through this reserved power of the State, may be said to possess and enjoy the land condemned for use by these railroad companies. And this is the public use which has been held to justify the exercise of the power of eminent domain in behalf of such corporations, a power which, by the barrier erected by the constitution, requiring payment of full compensation to the owner, is far less susceptible of legislative abuse, and far less dangerous to private right than the power of taxation.

And here it occurs to us to observe, that under the principles

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announced in the Dartmouth College case and in the numerous cases which have followed it in the same court, and by the authority of which the courts of all the States are bound, this power of the State to regulate and control the franchise and fix the amount of the tolls, and without which the public use cannot exist, has frequently been wholly lost. The doctrine of those cases, that the charters of such corporations are contracts between the State and the corporators or stockholders, and, as such, irrevocable and unchangeable at the will of the legislative body which granted them, unless the power to alter or repeal is expressly reserved, overturns entirely the principle upon which the power of eminent domain has often been exercised in behalf of corporations thus chartered and organized. It is totally inconsistent with the ground upon which that principle has been held to apply, that the power and control of the State, and consequent public use, should be thus extinguished; or that such power and control should be exhausted by the legislature having regulated the tolls or fixed the rates for carriage and transportation in the first instance; or that it should be competent for the legislature, in any manner, or by any contract with the corporation, or its promoters or stockholders, to part with its authority in the premises. A corporation of this kind, which is above the power and control of the State in these particulars, is not for the public use, so as to justify the exercise of eminent domain in its behalf; and it appears to us, that, as to every act of incorporation thus falling within the decisions of the federal supreme court, it should have been so held. It appears to us, also, in the passage above quoted, that Chancellor WALWORTH, eminent as he was for sound learning and judicial ability, was inconsistent in putting the public use which would authorize the application of the principle of eminent domain upon the ground that the legislature might, "from time to time, regulate the use of the franchise and limit the amount of toll which it should be lawful to take," and then admitting or supposing that the legislature might, by contract with the railroad company, deprive itself of that power. But be this matter as it may in other States, the question can never arise in this State. Our people, by a most wise and beneficial provision in their constitution, have perpetually reserved the power to the legislature to alter or repeal all charters or acts of incorporation at any time after their passage. Const. art. 11, § 1. In this State, therefore, the public, have that use which has been held to justify the exercise of the

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power. The legislature, if it has not done so, may limit the tolls and fares to be received by this railroad company to a reasonable sum, beyond which the company shall not go. It may prevent abuses in that respect.

And now that we see precisely what this public use is, its character and extent, we are better able to judge whether it will sustain the power of taxation here claimed. We see that it is not a public use *per se*, which all agree will support taxation, but far from it. It is not that free and unrestrained use which the public has of its own property, but a mere right, on the part of the public, through the legislature, to control the franchise of the company and regulate its use of the property belonging to it, so as to prevent oppression, and avoid the imposition of unreasonable and unjust burdens upon the people who are obliged to avail themselves of these great channels of trade and communication. In *The West River Bridge Company v. Dix*, above cited, a critical examination into the nature and extent of this public use became necessary, and the subject was most thoroughly and exhaustively canvassed and considered. The legislature of Vermont, conceiving that it might sometimes be expedient to convert the turnpike roads and toll-bridges in that State into free roads and free bridges, passed an act authorizing the supreme and county courts to take any real estate, easement or franchise of any turnpike or other corporation, when, in their judgment, the public good required a public highway, and providing that compensation should be made in the same manner as in the case of highways laid out over individual or private property. Under that act, the franchise and property of the West River Bridge Company, a corporation created by the laws of that State, and whose charter had some sixty years to run, were seized for public use. The company resisted the proceedings on various grounds, all of which were overruled. The cause was argued for the company by Mr. Collamer and Mr. Webster, and on the other side by Mr. Phelps, the two latter being at that time senators of the United States. One objection urged against the proceeding was, that the property was already devoted to the public use, and that there could be no such thing as seizing it again for a public use of the very same kind.

In reply to this Mr. Phelps said (and we feel no hesitancy in quoting the language of so distinguished a lawyer, judge, and statesman, though used in argument, especially when such argument was fully sustained by the decision of the court), speaking of the power

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of eminent domain: "But the question has been agitated elsewhere and may be started here, whether a franchise granted to private persons for their private emolument, and yet for a public use, is not beyond the reach of that power. These cases being of a *mixed character*, combining private right and emolument with public convenience, the question resolves itself into two others, viz.: 1st. Are the private rights thus conferred of any superior sanctity? And 2d. Does the *partial, qualified and limited appropriation of the property to public use* exclude the further exercise of the right of eminent domain?" And Mr. Justice McLEAN said: "The use of this bridge, it is contended, is the same as before the act of appropriation. The public use the bridge now as before the act of appropriation. *But it was a toll-bridge, and by the act it was made free. The use, therefore, is not the same.* The tax assessed on the citizens of the town to keep up and pay for the bridge may be impolitic or unjust; but that is not a matter for the consideration of this court.' These references show very clearly the differences existing in public uses, and that the public use in the case of a railroad owned and operated by a private corporation is but a partial, qualified and limited one. It is qualified and limited by the private right which the railroad company has to ask and demand, of every person who uses its road, a reasonable fee or toll, which reasonable fee or toll may be fixed by act of the legislature. And in the case of the toll-bridge which was made free by right of eminent domain, the taxes which the people paid to compensate the company for the franchise and property taken from it became a substitute for the tolls which had been theretofore paid. Before the act of appropriation the public could use the bridge only upon paying tribute to the company, but afterward it was free. *The proposition here is to compel the public to pay tribute and taxes too—to pay for the property and yet not to own it—to pay for it, and yet pay the company for the privilege of using it.* Is there to be no discrimination upon different public uses for these different purposes? Is the *partial, qualified and limited public use* which has been held sufficient to justify the exercise of the power of eminent domain in behalf of these private railroad companies, also to be held sufficient to justify the exercise of the power of taxation for the sole and immediate purpose of donating the moneys raised to such companies? If it is, then indeed are the proper objects of taxation greatly multiplied. The power of the legislature to regulate the tolls and charges

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of such companies is in itself a limited one, if not in a constitutional sense, certainly in the sense of morality and justice. If there be not an express, there is certainly an implied, obligation and promise on the part of the State never to reduce the tolls and charges below a standard which will be reasonable, or which will afford a fair and adequate remuneration and return upon the amount of capital actually invested. This obligation and promise, which spring from the act of incorporation and invitation by the State to persons to invest their money in the stock, it is presumed no legislative body would disregard, except where the company, by gross and wanton abuse of its privileges, had forfeited its rights, and then, instead of legislative action, it is also presumed that the regular course of judicial proceedings would ordinarily be preferred. The true intent and object of the power is, that the legislature shall be able to protect the rights and interests of the people, but not that it shall arbitrarily or unnecessarily impair the rights or franchises of the company, or destroy the property of its stockholders. The good faith of the State is pledged against this, and it is not within the range of presumption that it will ever be done. The individuals owning the property, and whom the corporation represents, purchase it under this pledge and inducement held out by the State. To them it is a matter of mere private business, engaged in under the sanction and encouragement of the State, and for their individual gain and emolument, and the legislature will no more unnecessarily interfere with it, or with the business of the corporation where it is legitimately and properly conducted, than it will with any other private business.

As yet we believe the power has never been exercised with respect to any railroad company organized in this State, and possibly it may never be. It is valuable, however, as a check upon the rapacity which these corporations sometimes exhibit, and the time may come when the legislature will be imperiously required to exert it; but when it does, if ever, it will not be to deprive the corporation or its stockholders of their legitimate rights, but to correct abuses and save the rights of the people. The legislature will not reduce the tolls or rates to an unreasonably low figure, or so as to disappoint the just expectations of the owners of stock. It will not destroy the earnings of the road, or cut off satisfactory dividends upon the cash capital actually paid in, if the business of the company is such as to afford them. In fine, it will hold the company only to the receipt

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of *reasonable* tolls, and this with a view to the nature and extent of its business, the expenses necessarily incurred by it, and the amount of capital invested. The legislature will not cut down the tolls unreasonably with a view to compensating the loss of the company by taxing the community at large, for that would be to defeat the very principle upon which all these companies are organized and roads built. That principle is, that those persons should pay for the building and operating of the roads, who use them, and as they use them. They pay their taxes for these improvements when they pay their tolls.

Regarding the reserved power in this light, and as it in fact exists and will continue to exist, and considering that it constitutes the only legitimate basis of any public use which will justify the exercise of the power of taxation here contended for, we see at once, if the power be conceded, that there are other private business pursuits for the benefit of which, or of the persons engaged in them, taxes may also be levied. All common carriers of passengers and goods are bound to receive and carry, unless some valid excuse be shown, when tendered a *reasonable compensation*. This is the right of the people at large — of all. It is compulsory by them, and not optional with the carrier. Angell on the Law of Carriers, §§ 124 to 129, and authorities cited. If this tax be valid, why may not the people be taxed to make donations to common carriers? And as all innkeepers stand upon the same footing with respect to the rights of the public and the sums which they may charge for entertainment, why may not taxes be levied for their benefit? But it may be said that the legislature has not the power to fix the sums which carriers shall charge. This is by no means certain. But if not to tax for common carriers, then certainly the power would exist to tax for the benefit of all owners of grist-mills throughout the country. In the case of a grist-mill, the private property of any person, there exists the same public use as in the case of a railroad. It differs from it in no respect whatever. The legislature may regulate and limit the tolls for grinding at its pleasure, and provide, as the legislature of this State has done, that the owner shall receive and grind the grists of others in preference to grinding his own grain. Laws of this character exist in every State of the Union, as well as in those where it has been held that the right of eminent domain cannot be exercised in behalf of mill owners, as in those where it has been held that it can. And in this State it is immaterial whether the head or

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power of water which propels the mill is created by flowing the lands of others, under the authority granted by the Mill Dam Act, or only by flowing the land belonging to the owner of the mill. The act applies to and regulates the tolls and manner of conducting the business in all grist-mills moved by water. R. S., ch. 60. When, therefore, the owner of a site and adequate mill power upon his own land became desirous of improving it by the erection of a grist-mill, he might apply to the legislature for an act to tax his neighbors to furnish funds for that purpose, and such act would be valid; or, having erected his dam and built and put his mill in operation, he might, from time to time, afterward procure such taxation for his private or individual benefit; and no lawful objection could be taken thereto. For ourselves, we cannot think that this kind of public use, though it may sustain the power of eminent domain, will also sustain taxation like this, and we here end our remarks upon the point.

Again, it is said that the property in the hands of these railroad companies is public property, and therefore such taxation is justifiable. This proposition requires not much discussion. The contrary has been the settled law both in England and this country ever since these and kindred corporations, as plank-road companies, turnpike companies, toll-bridge companies, ferry companies and the like, have had an existence, and for the earlier authorities to this point we refer to the citations in the brief of council in *Charles River Bridge v. Warren Bridge*, 11 Pet. 433. Not only the property in the road, rolling stock, fixtures, and all buildings and appurtenances, is recognized and protected as the private property of the corporation, but also the franchise itself. It is subject to mortgage, lease and sale by the company, and may be seized and sold on execution against it. And, if it belonged to a natural person, it might also be bequeathed or disposed of by will. "A franchise," says Mr. Justice DANIEL, delivering the opinion of the court in *The West River Bridge Co. v. Dix, supra*, "is property and nothing more; it is incorporeal property, and so defined by Justice BLACKSTONE, when treating, in his second volume, chap. 3, page 20, of the rights of things. It is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyment." And Mr. Justice McLEAN says, in the same case: "*It is objected that this bridge, being owned by a corporation and used by the public, does not come within the designa-*

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tion of private property. All property, whether owned by an individual or individuals, a corporation aggregate or sole, is within the term. In short, all property, not public, is private." And, in the same case, Mr. Justice WOODBURY, speaking of the franchise, says: "It is also property, subject to be sold, sometimes even on execution, and may be devised or inherited." And further on he adds: "I concur, therefore, in the further views, that the corporation as a franchise, and all its powers as franchises, *both being property, may for these and like reasons, in proper cases, be taken for public use for a highway.*" And in *Thorpe v. R. & B. R. Co.*, 27 Vt. 151, Chief Justice REDFIELD, in pronouncing the judgment of the court, says: "It is admitted that the essential franchise of a private corporation is recognized by the best authority as private property, and cannot be taken without compensation, even for public use." And on page 155, speaking of the case of *Swan v. Williamson*, 2 Mich. 427, where it was denied that railways were private corporations, he says: "But that proposition is scarcely maintainable so far as the pecuniary interest is concerned. If the stock is owned by private persons, the corporation is private so far as the right of legislative control is concerned, however public the functions devolved upon it may be."

To these authorities many others might be added, but it is deemed unnecessary. And the force of the language quoted and emphasized by counsel, from the opinion of Chief Justice SHAW, in *Inhabitants of Worcester v. The Western Railroad Corporation*, 4 Met. 566, to the effect that the real and personal property there vested in the corporation was "in trust for the public," consists in concealing or losing sight of the facts of that particular case. The act of incorporation there was peculiar, and it appears in the very next paragraph of the opinion how that trust was created. And the doctrine of the isolated case of *Erie and Northeast Railroad Co. v. Casey*, 26 Penn. St. 287, by a divided court, that, after the repeal of the charter of a railroad company, the property belonging to the corporation is public property, and that the State may take possession of and hold it, regardless of the rights of stockholders and of the creditors of the company, is so clearly in opposition to every other adjudication upon the subject, that it seems almost a waste of time to talk about it. This conclusion is as startling and unjust to the companies as the taxation here insisted upon is to the people. And the chief reason given for the decision seems quite as strange as the decision itself. It is, if the road be not held to be

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public property belonging absolutely to the State upon the repeal, that to repeal the charter would be to give the corporation a new and perpetual lease of life, emancipated from all legislative control and authority, and that it might continue to run the road and receive tolls at the mere pleasure of the stockholders. It is somewhat singular that it should not have occurred to the court, that the right to run a railroad, taking tolls or fares, is a franchise which no person or corporation can legally exercise without a special grant from the legislature. When the charter was repealed, this franchise was gone, and the owners of the road could not thereafter operate it in defiance of law; and the property of the corporation was subject to disposition in the usual course of judicial proceedings, like that possessed by any other private corporation at the time of its dissolution. It would be repugnant to the constitution of the United States, as interpreted by the supreme court, to hold that the obligation of the contracts of such corporations could be impaired by the repeal of their charters. "The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the corporation which has not passed into the hands of *bona fide* purchasers, but is held in trust for the company, or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws." *Mumma v. The Potomac Company*, 3 Pet. 286. See, also, *Curran v. State of Arkansas*, 15 How. 304, and cases cited.

A further argument in support of the power is, that a writ of *mandamus* will lie at the instance of the State to compel the company to build and operate its road, and that when the public have such an interest taxes may be levied. This seems to be a consideration of some importance; but unfortunately for the argument, the English case cited and relied upon by counsel has been overruled, and it is now held in England, under charters very much more specific and stringent than any granted in this country, that there exists no obligation on the part of the company, either before or after entering upon the work, to complete it. 18 Eng. L. and Eq. 199, 211; 2 Redfield on Railways, § 192 and note 5. And in the case of *The People v. The Albany and Vermont Railroad Company*, 24 N. Y. 261, it was held that no injunction could be granted at the suit of the people to prevent a railroad company from abandoning a portion of its road and removing the track; and although it was intimated that *mandamus* or indictment would lie,

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yet the whole reasoning of the court was against it. The writ has never yet been sustained in any case in this country, and Judge REDFIELD says, in the note above referred to, "that the later English decisions certainly conform to what has ever been regarded as the law upon that subject in this country." The court in that case say: "It is optional with the corporation whether it will exercise the powers bestowed, or undertake the work; and, being so, the grant and acceptance of the railroad franchise cannot properly be construed a contract between the State and corporation, binding the latter to construct and maintain the railroad for the public benefit. It is only from the charter and its acceptance that any contract relation between the State and corporation can arise; and such contract must be operative, if at all, the moment the charter is accepted. The provisions of the railroad act negative the idea that any contract relation between the State and the corporation formed under it springs out of the grant and acceptance of the franchise. There is, therefore, no contract obligation resting on the corporation brought into existence by the railroad act, in favor of the State or interested citizens, to construct, maintain and operate, for the public convenience and use, the road named in the articles of association. But is the duty specially declared, or necessarily to be implied from the provisions of the railroad act? There is no such duty specially declared. There are no express words of the act requiring the corporation created under it to make and maintain the roadway. Had there been, there probably would have been but few corporations formed under it. Nor do I think the duty can be clearly collected from the general purview of the whole statute. To promote the construction and maintenance of railroads to be publicly used in the conveyance of persons and property, is undoubtedly a purpose of the law. It invites capitalists into this field of enterprise, *not as public servants, charged with a public duty, but as private corporations*, whose privileges are to be exercised, if at all, under limitations and restrictions looking to the benefit of travelers and patrons of the work. The legislature, in effect, say, as the proposed road is to be of public utility, we empower you to build and operate it, and to that end confer on you corporate existence and the power to act in a corporate capacity, and also the further power to take lands for corporate use, *in invitum*. *The corporation is essentially a private one*. If it constructs and operates the road, it is to do it under the limitations and restrictions imposed by law. It may

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never, however, enter upon the construction of the proposed road. * * * And if no duty is imposed to construct, it must follow that there is none to maintain and operate the road after the construction. Such duty cannot be created by the act of the corporation itself." Now, these observations of the court of New York apply with equal force to the charter here, and, indeed, so far as we know, to all the railroad charters granted in this State; and after the people of Fond du Lac county have levied this money, there is nothing in the act of incorporation, or in that for imposing this tax, to bind the company ever to run a single car over the road, or prevent it from taking up the track and abandoning the use of the road entirely.

Another and the last point is upon the authority of those decisions in which it has been held that municipal corporations, when authorized, may become subscribers to the stock of these railroad companies. It has been said that to discriminate between cases where stock has been subscribed for, and those where it has not, but the money is to be given to the company, is "to dwarf and obscure the real nature of these works, and unduly to magnify into the place of principal, a feature which was merely casual, incidental and comparatively unimportant." Whether this appears so or not depends very much upon what our attention is given to. If we are looking to the rules and principles of law governing the subject, there would seem to be very good ground for the discrimination. To the extent of the stock subscribed the municipality *owns* the road, and it may be said to be *public* property. We have seen that whether the public *own* the property enters very materially into the consideration of the question, whether the purpose is public or not. We all know, too, that the position of one who gives as a gratuity to a corporation is very different from that of a stockholder in it. The stockholder has certain legal and equitable rights, which he may enforce, while the giver of the gratuity has none. The stockholder may insist upon the strict application of his money to the legitimate purposes of the corporation. He may restrain the directors and officers from squandering and misapplying it, and compel the company to use its funds in building and operating the road, according to the true intent of his subscription. He who gives money to the company can exercise no such rights. And, besides all these, the correctness of this line of decisions, upholding municipal subscriptions to the stock of railroad companies, has been questioned by very high

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authority. Judge REDFIELD says: "For ourselves, we are free to confess that we never could comprehend the basis upon which so many able jurists in this country have professed to perceive clearly the reasons for giving municipal corporations the power to become stockholders in railway companies. We have always felt that it was one of those cases in jurisprudence where the wish was father to the thought." 2 Redfield on Railways, § 230, note 1. Certainly the consequences of upholding such subscriptions have been most sad and disastrous to many cities, towns and counties throughout the country; and it is obvious, from the tenor of Judge COOLEY's remarks, that the doctrine does not meet his approbation. Const. Lim. 213, 214. Shall decisions thus doubted and questioned be held to justify or compel a further step in the same direction? We think not, and are prepared to say, as was said by Judge SHARSWOOD and the court in the special street taxation case in Philadelphia, "Thus far shalt thou go, and no further." *Hammet v. The City of Philadelphia*, 8 Am. Law Reg. (N. S.) 422.

PAINE, J., dissented.

Rehearing denied. Judgment reversed and order refusing to vacate injunction affirmed.

PETTIGREW, appellant, v. THE VILLAGE OF EVANSVILLE and another.

(25 W12. 233.)

Municipal Corporation — Drainage of land — Right of inferior heritor.

Where a municipal corporation is proceeding to drain its lands by the construction of artificial channels in the direction of land adjoining the corporation, to the permanent injury of such adjoining land, the owner thereof may restrain the construction of such channels by injunction.

A municipal corporation can acquire the right to turn a stream of water upon the lands of another, to the injury thereof, only by an exercise of the power of eminent domain.

SUIT to restrain the drainage of the village of Evansville to the injury of plaintiff's premises adjoining the village. The plaintiff is

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the owner of an undivided ninth part of lands adjoining the village. There was a pond in the village which the street commissioners attempted to drain by commencing the construction of a large ditch, which would lead the water off in the direction of and upon the land of the plaintiff. A temporary injunction was granted on the complaint. At the circuit the facts found were as follows:

"1. All the material allegations of the complaint are true. 2. There is no water-course through or from the pond in question, but the same is a collection of surface water, and is supplied entirely by the rains and melting snows, and not by springs or permanent streams; and the waters in said pond very rarely flow and run off in any direction, but they have done so in a few instances within the past few years, in the spring and before the frost was out of the ground; and in those instances the waters ran off in the direction stated in the answer [to wit, southward from said pond along said Second street to Church street, thence westward for about six rods, thence southerly and easterly to said Second street about twelve rods north of Liberty street, thence southward along said Second street to the premises described in the complaint as belonging to plaintiff.] With these exceptions, the waters in said pond have been wasted by evaporation and percolation. 3. It is necessary to drain said pond in order properly to improve the streets in said village of Evansville. 4. The excavation of said ditch along the west line of Second street is a part and parcel of a series of contemplated improvements, by which the defendants intend to drain the water which would otherwise accumulate in said pond, in a southerly direction along Second street, as far as Liberty street, the result of which will be that nearly all the waters, which otherwise would have collected and wasted in said pond, will be discharged upon the said lands of plaintiff, and will necessarily greatly damage the same."

The judge held that defendants had power to drain the property of the village, although it resulted in the injury of the plaintiff, and judgment was rendered in favor of defendants, from which the plaintiff appealed.

Williams & Sale, for appellant, cited Washburn on Easements, 226, 353-355; *Kauffman v. Griesemer*, 26 Penn. St. 407; *McCombs v. Town Council of Akron*, 15 Ohio, 474; *Goodall v. Milwaukee*, 5 Wis. 32; *Rhodes v. Cleveland*, 10 Ohio, 159; *Martin v. Riddle*, 26 Penn. 415; *Merritt v. Parker*, 1 Coxe (N. J.), 460.

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J. B. Cassoday and Willard Merrill, for respondents, cited *Dickinson v. City of Worcester*, 7 Allen, 22; *Parks v. City of Newburyport*, 10 Gray, 28; *Flagg v. City of Worcester*, 13 id. 602; *Goodale v. Tuttle*, 29 N. Y. 459; *Radcliff v. City of Brooklyn*, 4 Comst. 195; *Gould v. Hudson R. R. Co.*, 2 Seld. 522; *Lansing v. Smith*, 4 Wend. 9; *Myers v. Gemmel*, 10 Barb. 537; *Parker v. Foote*, 19 Wend. 309; *Broadbent v. Ramsbotham*, 34 Eng. Law and Eq. 555; *Ellis v. Duncan*, 21 Barb. 230; *Whately v. Baugh*, 25 Penn. 532; *Acton v. Blundell*, 12 Mees & Wels. 324; *Druecker v. Salomon*, 21 Wis. 627.

DIXON, C. J. This case differs from any heretofore decided by this court, and from any cited by counsel for the defendants. Here the injury to the plaintiff's land, arising from the proposed improvement of the street, is direct. In the others it was indirect and consequential merely. The defendants propose, by digging the ditch, to drain the waters of the natural reservoir, which now gather into it from a considerable distance over the surface of the surrounding country, and thence escape only by percolation and evaporation, and turn them immediately upon the land of the plaintiff, greatly to his injury, as the court below has found. This is a direct injury, as direct as if the defendants had proposed, without compensation, to throw upon the plaintiff's land earth, gravel, stone or other materials, which it became necessary for them to remove from the street in order properly to improve it. It is an injury in its nature as direct as if one were by spouts or troughs to turn the water from his roof immediately upon the soil of his neighbor, which all the authorities agree cannot be done. The case differs, therefore, from *Alexander v. Milwaukee*, 16 Wis. 247, where the injury to the property of the plaintiff was remote and consequential. The blowing of the wind in a particular direction caused the waters of the lake to beat in upon his premises and injure them. The municipal authorities did not there, as the necessary and immediate result of their act, turn the water upon the premises of the party complaining, as they propose to do here. And the cases of *Goodall v. Milwaukee*, 5 Wis. 32; *Weeks v. Milwaukee*, 10 id. 242; and *Smith v. Milwaukee*, 18 id. 63, so far as they bear upon the question under consideration, certainly tend very strongly to sustain the claim of the plaintiff. And of the decisions made by other courts, none which are cited can be said to authorize the claim set up by the

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defendants. The cases of *Parks v. Newburyport*, 10 Gray, 28, and *Flagg v. Worcester*, 13 id. 601, are supposed to give some color of authority for that claim; but even they do not, as we shall endeavor to show. All the other cases cited are to the point that one proprietor of land has no legal, and can acquire no prescriptive, right to have the surface water, accumulating on his own land by the falling of rain or the melting of snow, flow off on to or over the land of an adjoining proprietor as it has been accustomed and would in the future continue to do were the land of such adjoining proprietor suffered to remain as in a state of nature; nor can such adjoining proprietor, in case the flowing of the water off, on to or over his land should be beneficial to him, claim the legal right, or acquire the privilege by prescription, of having the same continue against the will of the owner upon whose land the water actually falls and accumulates. And the same rule holds good when applied to subsurface water passing through the earth by percolation. *Luther v. Winnisimmet Co.*, 9 Cush. 171, *Ashley v. Wolcott*, 11 id. 192, *Goodale v. Tuttle*, 29 N. Y. 459, *Rawston v. Taylor*, 33 Eng. Law and Eq. 428, *Broadbent v. Ramsbotham*, 34 id. 555, and *Ellis v. Duncan*, 21 Barb. 230, are all cases of this nature.

The principle upon which those decisions rest is very obvious. It is, that the loss or damage to the land of any proprietor, caused by the presence of surface water collected by the melting of snow or the falling of rain thereon, must be borne by himself, and that he cannot lawfully insist or claim by prescription that the same or any part thereof shall be sustained by the adjoining or other proprietor of land, even though the land of the latter was so situated in a state of nature that it would have received the water and sustained the loss. Every owner may lawfully so improve his own land as to prevent the flow of surface water thereon from the land of his neighbor. And so, too, if the running of the surface water from one man's land, when in a state of nature or otherwise, off, on to or over the land of another, is such as to be beneficial to the latter, still he cannot claim it as a legal right, or prescribe for it after any lapse of time. The first proprietor may so provide, by suitable erections or appliances on his own land, as to retain the water or cause it to flow in some other direction. And the cases in the 10th and 13th Gray hold no other or different doctrine. They merely apply the same general principle to towns and cities in their capacity of owners of land for highways and other public uses, and decide that such cor-

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porations, like other owners, are not liable in damages to the proprietors of other lands for interrupting the flow of surface water across streets or lands held for other public uses. It is the duty of every owner of land, if he wishes to carry off the surface water from his own land, to do so without material injury or detriment to the lands of his neighbors, and if he cannot he must suffer the inconvenience arising from its presence, and cannot complain that others refuse to allow it passage over their lands.

Such is the sound and wholesome doctrine of the law upon this subject; and although it does not go so far as to require the owner to resort to any artificial means to prevent the surface water from his land flowing on to the land of another, when such flowing is produced by natural causes, yet it will prevent him from using such means for the purpose of making it flow there, whenever the same would be materially injurious to the interests of the proprietor thereof. And it is also true, as stated in the books, that considerable latitude is left to the owners of estates as to the manner in which they will cultivate and improve them, and in so doing they may undoubtedly somewhat change the course and flow of the surface water, so as in a measure to increase the quantity which would otherwise pass upon the lands of others. They may also fill up low and wet places, so as to render them arable, or fit for crops, thus causing the water which previously settled in them to spread and pass on to the lands of others, doing no perceptible injury thereto. But the extent to which any proprietor may go, in these and other ways, in turning the surface water of his own land off on to the lands of others, must, in each case, we think, be determined by the degree of injury which it will produce. Very slight damage will not, perhaps, be regarded; but, if the injury be immediate, and such as to perceptibly and materially impair the value or destroy the usefulness of the adjoining estate, we apprehend that the law will not permit it to be done; and certainly we know of no adjudged case where it has been held that the waters of a natural pond or reservoir upon the land of one person may be drained by him directly upon the land of another, greatly to his injury; nor where one owner has been allowed, by means of a ditch, trench, sewer or the like, to gather the surface water from his own land and throw it upon the land of another, so as materially to lessen its value and produce injury to the owner. Such a proceeding would be contrary to natural right and justice, and the law does not sanction it. And the decisions to which we have

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alluded, and which were cited by counsel for the defendants, instead of supporting their claim are really against it. If the owner of land has the right, by artificial means, to prevent the flowing thereon of surface water from the land of another which in a natural state would flow there, it follows *a fortiori* that no owner may, with impunity, turn the surface water from his land upon the land of another, to the injury of the latter, when, without the employment of artificial means for that purpose, the same never would have flowed there at all. The two rights would be entirely inconsistent with each other—the right in one owner to undo or totally defeat what the other had rightfully done. And such are the decisions upon the subject, whenever we find any going directly to the point. In *Adams v. Walker*, 34 Conn. 466, it was held that a person has no right, by grading the surface of his land, to turn the surface water which ordinarily falls upon or flows over it, upon the adjoining lands of another; and that it makes no difference that he does it for the purpose of preventing the water from flowing into his well, or for other lawful purposes, and with no intention to injure the adjoining owner. And to very nearly the same effect is the case of *Miller v. Laubach*, 47 Penn. St. 154. It was there held, that if the defendant collected water from his own land and turned it in a body upon that of the plaintiff, through an artificial channel, to his injury, he was entitled to recover the damages he had sustained. And the same principle which governs as between individuals holds good as between towns and villages and individual proprietors. This we have seen by the decisions in Massachusetts above referred to. And the case of *Nevins v. The City of Peoria*, 41 Ill. 502, is an adjudication fully to the point we are considering. It was there decided that the city must respond in damages for injuries done to the property of the plaintiff, under very nearly the same circumstances as are here presented; and that if the city wished to acquire the right to turn a stream of water upon the premises, to the injury of the plaintiff, it must do so by an exercise of the power of eminent domain, and by the payment of full compensation as the constitution requires. We think that case was correctly decided, and that this must be decided in the same way.

Some observations may be thought necessary to distinguish this from the leading case of *Radcliff's Executors v. The Mayor, etc., of Brooklyn*, 4 Coms. 195. Enough has already been said for that purpose. There the injuries complained of were purely consequential.

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The public authorities did nothing outside the line of the street. They did not invade the premises of the plaintiff by conveying or causing to be conveyed thereon water or any other injurious substance. And this, we think, constitutes the true line of distinction, and one which is clearly recognized in the opinion in that case, on pages 198, 199, 200.

SCHNEIDER v. EVANS, appellant.

(25 Wla. 241.)

Common carriers — Through contracts — Construction of contract.

The P. F. & C. railway company received from the plaintiff at Pittsburgh goods to be transported to Hudson, Wis., guarantying on its behalf and in behalf of the other companies and carriers constituting the entire route that the through freight should not exceed a certain sum, but expressly restricting its liability as carriers to its own route. The connecting companies, acting independently of each other, and having no knowledge of the guaranty, charged their regular rates, each paying to the previous carrier, according to the established custom, all back charges. The goods were transported to Hudson and delivered to the defendant as warehouseman, by whom the back charges for transportation were paid—the sum exceeding that specified in the guaranty. The plaintiff tendered to defendant the amount due according to the guaranty and demanded the possession of the goods which was refused. In an action to recover possession, *held*, that the guaranty was not a “through contract,”—that each succeeding carrier after the first had a right to charge its usual rates and to pay the usual back charges, and that the defendant had a lien upon the goods for the full amount of the back charges paid by him.

It seems that the remedy of the shipper in such case is against the contracting company upon the guaranty.

SUIT IN REPLEVIN. The contract which formed the basis of this action is as follows :

“Pittsburg, Fort Wayne and Chicago Railway Co.

“Received, Pittsburg, October 4th, 1866, of Singer, Henrick & Co., the following described packages * * * consigned to J. C. Schneider, Hudson, State of Wisconsin, which we promise to transport * * * over the line of this railway to the company's freight station at Chicago, and deliver * * * to the consignee or owner, or to such company (if the same are to be forwarded be-

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yond the limits of this railway) whose line may be considered a part of the route to the place of destination of said goods or packages; it being distinctly understood that the responsibility of this company as a common carrier shall cease at the station where such goods are delivered to such person or carrier; but it guarantees on its part and on the part of other companies that the rate which he or they agree to pay for the transportation of such packages, from the place of shipment to Hudson station, shall not exceed \$1.10 per 100 pounds, and charges, upon the following conditions." The rest is unimportant. The facts were presented according to stipulation, and are substantially as follows:

1. The property described in the complaint is owned by the plaintiff, and is of the value therein alleged.
2. Said property was delivered to the Pittsburgh, Fort Wayne and Chicago Railroad Company at Pittsburg, Penn., by the duly authorized agent of the plaintiff at Hudson, Wis., and the said company, by its duly authorized agent, executed and delivered to plaintiff a certain written agreement (which is set forth above), at the time of the delivery of said property; and said property was delivered to, and received by, said company upon the conditions therein named and agreed upon.
3. Said property was conveyed by the Pittsburgh, Fort Wayne and Chicago Railway Company to Chicago, and by the Chicago and Northwestern Railway Company, and the Prairie du Chien and Milwaukee Railway Company from Chicago to Prairie du Chien, and by the Minnesota Packet Company from Prairie du Chien to Hudson, and delivered to the warehousemen, the defendants in this action.
4. The railways over which said property was transported, together with the packet line, form a direct route from Pittsburg to Hudson, and one of the usual and regular routes for transportation between the said points; said property was received by each of said companies in the order named and without any notice or knowledge whatever of the above-mentioned agreement; said companies acted independently, and not as a continuous line of transportation under a combination of interests. Said companies, after the first, charged their usual published rates for transporting goods at the time.
5. Each of the two last-mentioned railway companies and the packet company paid to the preceding carrier all back charges on said property; and each of said last-mentioned companies gave a new bill of lading or way-bill on receiving the goods; and this mode was the established custom among railway companies

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and packet lines in the west. 6. The defendants received said property from the Minnesota Packet Company, and paid back charges, according to the custom of warehousemen in the west, relying on their lien upon the goods, and the amount of back charges so paid exceeds that specified in the agreement mentioned, and has not been paid to defendants. 7. The said companies and the warehousemen acted without any other authority from the plaintiff than that conferred by the delivery of said property to the P. F. and C. R. R. Co. 8. Before the commencement of this action plaintiff tendered to defendants the amount specified in the agreement, together with the amount of defendants' charges as warehousemen, and demanded possession of said property, which was refused.

Judgment was rendered in favor of plaintiff, and the defendants appealed.

H. C. Baker, for appellants, cited *Dorr v. N. J. Steam Co.*, 1 Kern. 485; *Detroit and Mil. R. R. Co. v. Bank*, 20 Wis. 122; 2 Redfield on Railw. 120; *Meyer v. Harndeen's Exp. Co.*, 24 How. 290; Story on Agency, 127.

Henry Wilson, with *Spooner, Lamb & Spooner*, for respondents, cited *Fitch v. Newberry*, 1 Doug. (Mich.) 1; *Robinson v. Baker*, 5 Cush. 137; *Stevens v. B. & W. R. R. Co.*, 8 Gray, 262; *Clark v. R. R. Co.*, 9 id. 231; *Van Buskirk v. Purinton*, 2 Hall, 561; 37 Barb. 236.

The following opinion was filed at the June term, 1869:

PAINE, J. There can be no doubt that the contract between the plaintiff and the Pittsburg, Fort Wayne and Chicago Railway Company was not what is called a through contract. That company did not undertake to carry the goods to Hudson; on the contrary, it expressly restricted its liability as a carrier to its own route. It did, however, guarantee, on its behalf, and in behalf of the other companies and carriers constituting the entire route, that the through freight should not exceed a certain sum. But it is a stipulated fact in the case, that each of the companies acted independently, and that they did not form a continuous line, interested together in the transportation over the whole route. It is clear, therefore, that each of the succeeding carriers, after the first, had the right to charge its usual rates, without regard to the guaranty of the first company, even if this had been known. This is not

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disputed. But the respondent's counsel very ingeniously and forcibly urges, that, although this was so, yet, when the succeeding companies decided to charge their usual rates, that diminished, by the amount of the excess over the guaranteed rates thereby caused, the sum which the first company were entitled to; and that, therefore, the Chicago and Northwestern Company ought to have deducted the amount of such excess from the back charges which it paid to the Pittsburg, Fort Wayne and Chicago Company; and that it could not, by improperly paying over that amount to the first company, acquire any lien on the property as against the plaintiff for that sum, nor transmit any such lien to the succeeding carrier, who might receive it, paying also the same sum as a part of the back charges.

If the guaranty of the first company had been known to the others, the question would have been more difficult. But it is not entirely clear to my mind that even then the position of the respondent's counsel would have been correct. If it could be assumed that the Chicago and Northwestern Company, which received the property from the first company, could have known or readily ascertained the exact amount which the first company might ultimately be entitled to, after complying with its guaranty, there would be more force in the argument; but this could scarcely be assumed. There were several succeeding carriers after the Chicago and Northwestern. It might not have known what their usual rates would be. If it had known this, it might not know whether they would all charge their usual rates, or whether some of them might choose to conform to the rate guaranteed by the first company. It would seem impossible, therefore, for it to be able to adjust the controversy between the plaintiff and the first company, that might arise on the guaranty. Yet it would be evident on the face of the contract that the plaintiff desired the property to be transported, and that he contemplated the employment of the succeeding carriers on the route for that purpose. This the Chicago and Northwestern Company would have had the right to assume, even if it had known the exact terms of the contract. It would also have had the right to assume that the plaintiff knew the general custom among carriers so situated, of receiving goods from each other and paying the back charges. And under such circumstances it seems to me extremely questionable whether it would not be reasonable to say that the second carrier

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would have the right to receive the goods, paying the back charges demanded by the first, as though its guaranty was to be complied with by the other companies, leaving the plaintiff to resort to his contract to recover whatever he might be entitled to, when the fact should be ultimately ascertained. But, as this question is not presented, I will not pursue it further. It is conceded here that the other companies, after the first, had no knowledge of the contract between the first and the plaintiff. Upon these facts, it seems to me clear that the carriers who have acted in accordance with the usual general custom, which the plaintiff is presumed to have known, and probably did well know, in fact, ought to have their lien for the ordinary back charges paid by them. It would be unreasonable, where nothing accompanies the goods to notify them of the fact, to require them to ascertain at their peril whether there are any secret stipulations between the owner and some prior carrier from whom they have been received, which may ultimately prevent him from being entitled to the ordinary rates. It is not like the case of goods being delivered to a carrier by a person having no authority to deliver them, and then the carrier claiming a lien for his charges as against the true owner. Some cases have held that there the carrier has no lien, because the owner's title cannot be thus divested or incumbered. It is not a case where the goods have been diverted from their true destination; on the contrary, the goods have been transported over the whole route, exactly in accordance with the authority and intention of the owner. It is a mere question, where the owner has taken a guaranty from the first carrier that the through rate shall not exceed a certain sum, whether the others, having no knowledge of it, are not entitled to act upon the general custom. It seems to me that they are, and that it is more reasonable to impose on the owner, who, knowing the custom, causes the goods to be delivered to the carriers, without notifying them of his secret contract, the burden of resorting to the company with which he had contracted, than to impose on the carriers the burden of ascertaining at their peril all the secret agreements between the shipper and prior carriers from whom the goods are received, affecting their right to receive the ordinary freights.

The custom under which these carriers acted is more for convenience of shippers than of the carriers. It enables property to be transported over long routes, composed of many distinct companies

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and lines, with great safety and dispatch, and without the necessity of employing any intermediate agents other than the carriers themselves. If, therefore, the risk is to be imposed on each, to ascertain at its peril whether there are any secret agreements affecting the liability of goods received in the ordinary course of business to the ordinary freights, this liability must result in breaking up the custom, and thus tend greatly to the public inconvenience. Upon the facts found, the defendants were entitled to their lien for the back charges.

The judgment should be reversed, and the cause remanded with directions to enter judgment for the defendants.

So ordered.

On a motion for a rehearing the following opinion was filed at the January term, 1870.

PAINÉ, J. The question involved in this case is one of much interest to carriers, and of still more to shippers. And for that reason, doubtless, the decision already made provoked criticism through the press from several legal gentlemen in different parts of the State. And, on a motion for rehearing, we have been furnished, not only with the able arguments of counsel engaged in the case, but also with such further light as may be derived from the discussions of those gentlemen who so kindly volunteered to aid in the solution of questions of public interest. We have also had an opportunity to inspect an elaborate brief on the same subject by a lawyer of New York. But a very attentive re-examination of the subject has only confirmed our conviction of the correctness of the decision already announced. Still, as the question is one of intrinsic importance, and one on which there seem to be few direct authorities, perhaps it is due to those interested that we should attempt some further answer to the objections that have been urged against our conclusion.

¶ We shall not attempt to answer any criticism founded upon the assumption that the successive carriers on the route, after the first, had notice of the special guaranty made by the first, in respect to the amount of the through freight. It was stipulated on the trial of the case, that each of such succeeding carriers "*had no knowledge whatever*" of the agreement. It was so found by the court below. And although this may not prevent legal critics from

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assuming that the contract itself was actually sent with the goods, and that each of the carriers had full notice of its provisions, yet this court cannot, upon such a stipulation and finding, feel at liberty to indulge in such an assumption.

The first question which, perhaps, deserves some further attention is, whether the contract between the shipper and the first carrier was a *through* contract. That it was not, seemed so plain upon the face of the contract itself, that in the opinion already filed it was deemed necessary only to refer to its explicit provisions. But, notwithstanding the promise of the company was only to transport over its line, to its freight station at Chicago, and deliver to the owner or consignee, or, if to be forwarded beyond its line, to such company whose line might be considered part of the route to the place of destination; notwithstanding it expressly declared that it was distinctly understood that its responsibility as a common carrier should cease at the station where the goods were delivered to such person or carrier, it is still strenuously insisted, particularly in the brief of the New York lawyer above referred to, that, by the true construction of such a contract, the first carrier undertook to deliver the goods at Hudson, their ultimate place of destination.

The English courts have gone great lengths in imposing upon carriers, who receive goods marked for transportation to some point beyond their own route, a contract to carry them to such point. And the brief referred to relied mostly upon English decisions. The case most nearly like the present, in which they have held that rule, was that of *Collins v. E. & B. Railway*, 5 Hurl. and Norm. 969, in which the house of lords reversed the judgment of the exchequer chamber. There were, however, special facts in that case, and peculiar provisions in the shipping contract, on which the decision turned, that do not exist here. It assumed that if the contract had been clear that the first company was to carry only over its own line, then it would only have had that effect. This was, in fact, clear enough in that contract; and the true law of the case is evidently to be found in the opinions of the majority of the judges, who held it to be not a through contract. But they were outnumbered by the venerable chancellors and the law lords, who, with "considerable doubt," and "not without some hesitation," acquiesced in the views of their "learned and noble friends."

But the American courts have steadily adhered to a different rule,

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and have construed the contracts of carriers, arising from the reception of goods in the ordinary manner, marked for some place beyond their own routes, to be only to carry over their own routes, and deliver to the carrier next in order. It is true, they have generally sustained the power of railroad companies as carriers to bind themselves by contract to carry and deliver goods beyond their own termini; though the supreme court of Connecticut has, in several recent decisions, re-examined that question, and denied such power altogether, upon the ground that such contracts would be beyond the scope of the charters of such corporations. But the courts that uphold the power have manifested no disposition to impose such contracts upon the carrier by construction, and require that, before he shall be held so bound, it shall appear that he intended to make such a contract.

But whatever room there might be to contend for the application of the English rule to a case where the carrier merely receives articles marked for some point beyond his own route, without expressly undertaking to carry to that point, or expressly refusing so to undertake, still, when, to remove all doubt on the subject, he expressly declares in his contract that he will not undertake to carry beyond his own terminus, for any court to hold that, nevertheless, he does so contract, seems to be nothing less than a judicial outrage, not only on the principles of construction, but on the right of parties to contract for themselves. But, of course, such a position would not be taken without some pretext on which to base it. That pretext is found in the fact that the first carrier guaranteed, on its own part, and on the part of the other companies, that the through freight should not exceed a certain rate. It is obvious that this stipulation, construed according to its terms, not only fails to support, but plainly refutes, the theory of a through contract. If the first carrier contracted to carry to Hudson at a certain rate, it would seem wholly superfluous, if not absurd, for it to guaranty that the freight should not exceed that rate. The word "guaranty" plainly imports that the parties contemplated that the successive carriers on the route were at liberty to act, each for itself, and wholly independent of the others. This is clearly perceived, if the word "guaranty" is to have its appropriate legal meaning. Hence, it is contended that it was not used in its technical sense; it is said that it could not have been so used, because the first carrier guaranteed "*on its own part,*" as well as on the part of other companies.

But this is altogether too technical in an argument against technicality. It is true that it would not be technically appropriate to say that a man guaranteed his own agreement. A guaranty is collateral, and relates to some contract in which some one else is principal. But where, as in this case, the stipulation relates to the entire freight over several distinct and independent lines, it is, as to all beyond the first carrier's own charges, in the strictest and most technical sense, a guaranty. And this being so, it was not only natural, but strictly and technically proper, to use the word "guaranty," although the charges of the first carrier were included in the subject-matter. That circumstance is wholly insufficient to raise any inference whatever that the word was not used in its strict legal sense. But were there any room for doubt on the face of this provision alone, when it is seen that, in other parts of the same contract, the first carrier has expressly limited its own contract as carrier to its own line, it becomes irresistibly clear that the word "guaranty" was designed to have its strict technical and legal meaning.

It appeared from the New York brief, that the judge before whom that case was tried took the same view of the effect of this stipulation that we have taken. But it was appealed to the general term; and how it was there decided we are not advised. But it would take a great number of authorities to have weight enough to transform a contract, by which a carrier expressly refused to carry beyond his own line, into a contract to carry beyond it, by the mere force of a separate provision, which necessarily implied on its face that his undertaking as carrier extended only to his own route. In the case of *D. & M. R. R. Co. v. The F. & M. Bank*, 20 Wis. 122, the language of the bill of lading furnished much stronger ground for holding it a through contract than is furnished in this case. The receipt stated that the property was to be "*sent by the Detroit & Milwaukee Railway Company through to New York, at \$1.95 per barrel.*" Yet, because it said, also, "under the conditions stated on the other side," and one of these expressly limited the liability of the company as carrier to its own route, it was held not to be a through contract.

And, since the former argument, we have found some other cases that throw light upon the subject. In *Darling v. B. & W. R. R. Co.*, 11 Allen, 295, the court construed a contract substantially like this one, and almost in the same words. The question there, however, did not relate to the right of the last carrier to collect all the

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charges that had accumulated on the goods, and which had been paid by it in the usual manner. The consignees, in that case, had paid these, and then brought an action against the last carrier for damages to the goods which had accrued before they reached its line. The court, speaking of the contract, said: "This contract does not attempt to bind other carriers, except so far as it guarantees the rate of freight. But the guaranty itself is a contract of the Michigan Central R. R. Co. with the consignor, and all the stipulations are so framed as to exclude the idea of joint responsibility with other carriers." They said further: "*The defendants collected the whole expense of the plaintiff, because they had advanced the portion that was due to the other carriers when they took the goods.* They were not parties to the contract beyond Albany, and, upon the principles above stated, they are not liable for the default of any of the parties to those contracts."

The defendant in that case, in paying the back charges, had evidently paid those of the carrier responsible for the damage. And, although their right to collect them of the consignees was not in question, yet the court, in saying that they did "collect the whole expense, because they had advanced the portion due the other carriers when they took the goods," very strongly implied that they had a right so to collect them, without having been bound to inquire into any question of deduction on account of damage arising between the owner and prior carriers. But, although the case cannot be considered an authority upon this particular point, yet, on the general question whether such a contract as the present is a through contract, it is a direct adjudication in the negative.

So, also, in *McMillan et al. v. The M. S. & N. I. R. R. Co.*, 16 Mich. 79, the remarks of the court, in commenting on certain bills of lading given by an Ohio railroad company, have some bearing on the question. Those were not like the one given here. They undertook to deliver the goods "at Toledo for Detroit." There was no guaranty as to the through freight, though the court did not consider it clear, upon the face of the contract, whether the freight specified was intended for the whole route to Detroit, or only to Toledo. But, in considering its effect, they say, on page 121: "It does not even appear that the charges agreed upon were for the whole route; *and if they were, the case, I think, would not be affected by that circumstance.* The only consequence would be, to make the whole freight payable to the defendants, who would deduct their

own charges and pay over to the Ohio company what remained. Fixing upon the price would only amount to an agreement by the Ohio company that the whole charges should not exceed that sum. In the absence of agreement between the two companies, *the defendants would not be compelled to conform their own rates to those agreed upon at Cincinnati.*" Upon some of the questions in that case the court were equally divided. But the judges all agreed upon the construction placed upon these bills of lading. So that the opinion was unanimous, that, where the first carrier contracts to carry only over his own line, even though he guarantees that the through freight shall not exceed a certain sum, the subsequent carriers are not bound by this, but may charge their own rates, and have all the rights, and are subject to all the obligations, of independent carriers; though it was also held, that, if they should receive and carry them with notice of the agreed rate, this would doubtless amount to an assent to it on their part.

We have thus attempted to show that this cannot be regarded as a through contract, for the reason that, if it were, the relations between the shipper and the carriers subsequent to the first do not seem so well settled as in the other case. The English courts seem to hold that the subsequent carriers are merely the agents and subcontractors of the first, and that there is no privity of contract between them and the shipper. There are cases in this country which hold, that although they are agents of the first carrier, yet there is also a privity of contract between them and the shipper, and that he may hold either of them directly responsible for its own actual default. Such a rule seems an attempt to blend two opposite theories together, and allow the shipper the benefit of both.

But, notwithstanding any uncertainties that might exist on this point, we do not think that, even if this were conceded to be a through contract, it should, upon the facts in this case, alter the result. It might not in that event be so well settled, that, in forwarding the goods by the succeeding carriers, the first acted as the mere forwarding agent of the shipper. But whether that could be said or not, we still think it must be held that the goods came to their possession and were carried by them under his authority, and that, in the absence of any negligence on their part in obtaining proper information, they were entitled to act upon the general usage and custom of the business, and acquired all the rights as against him which they would ordinarily have under that usage. We hold

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this, because the shipper, knowing the custom, has caused his goods to be delivered to them for transportation, subject to back charges, without informing them, or causing them to be informed, that such back charges were different from the usual rates. If he has done this, and either he or they must suffer a loss by reason of their paying the usual rates, he ought to suffer it and not they.

We distinguish the case from that of *Travis v. Thompson*, 37 Barb. 236, cited by the respondent, upon the ground that that decision rested upon negligence imputed to the succeeding carrier, in not ascertaining that a part of the freight had been prepaid. The opinion of HOGEBOM, J., plainly intimates, that if the plaintiff had consulted the bill of lading, and found there no mention of the prepayment, he would have had a lien for the entire back charges he had paid, according to the usual custom. GOULD, J., expressly said so. But because it did not appear that there was no bill of lading with the goods, showing the prepayment, they assumed that, if the plaintiff had consulted the bill, he would have ascertained the fact, and was therefore guilty of negligence. But in this case we are not entitled to impute any negligence to any of the succeeding carriers in not ascertaining the special rate guaranteed. It is true that there was no direct evidence as to whether there was any bill of lading showing that rate or not. But the parties saw fit to remove that question from the case, by stipulating directly that none of them "had any knowledge whatever of that agreement." Clearly, upon such a stipulation, we are not entitled to assume that they were guilty of any negligence in failing to have such knowledge. We consider that case, therefore, entirely in harmony with our conclusions.

There are certain general propositions in the opinion of Justice HOGEBOM worthy of special attention. The contract in that case was made with Clemons, Jones & Co., to transport lumber from Montreal to Troy. It was a through contract. The plaintiff was an independent carrier over a part of the route, that between Whitehall and Troy. On receiving the lumber from Clemons, Jones & Co., he paid the entire back charges, including \$100 that had been prepaid. On the general relations between the parties to such a contract, Justice HOGEBOM said: "3. Clemons, Jones & Co., by virtue of the contract, of course went into the possession of the goods, and had lawful possession with the consent of the owner. 4. This circumstance invested them with an apparent authority over the goods, probably sufficiently so to authorize them to employ

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another carrier to forward the goods to the place of destination, and to vest the latter with a lien thereon, for the price of transportation, if such was the custom and course of business. 5. The plaintiffs, therefore, came into possession of the lumber under a lawful authority, and had a right to transport the same to Troy, and, I am inclined to think, so far as their own labor and services were concerned, to charge the ordinary rate of transportation for such labor and services, and to assert a lien therefor." Further on in the opinion he adds: "As to the freight earned by themselves, it may be they were independent freighters, and entitled to enforce their lien against the goods, even though the whole freight had been prepaid at Montreal."

These general propositions are entirely in harmony with our views as to the relations between the parties to a through contract, and the independent carriers, whose employment in its execution they both contemplate. It is this that broadly distinguishes such a case from all those where the goods are delivered to the carrier, without the owner's consent, by a wrong-doer. In the one case the owner never consents to the delivery of the goods to the carrier; in the other he not only consents to it, but actually contracts that it shall be done.

This also takes the case out of the reasoning of Justice WOODRUFF in *Mallory v. Burrett*, 1 E. D. Smith, 234, which is cited and strongly relied on by the respondent's counsel. In that case the through contract was made with a transportation line, which held itself out as a carrier for the entire distance between Cincinnati and New York. It was like the case of a contract with an express company. Justice WOODRUFF placed his conclusion upon the ground that, in such cases, there is a personal confidence, and the carrier contracted with has no right to deliver the property to other independent carriers for transportation; and that, if he wrongfully does so, the others act wholly in subordination to the contract. But in one part of his opinion he considers the question we have before us. And he so clearly states our views, that we feel justified in quoting at some length. Commencing on page 242, he says: "But where the carrier employed is confined within certain limits, and, according to the course of his particular business, carries only within such limits, and forwards thence by other lines, it may be said with much plausibility, if not with truth, that one who intrusts goods to him, which are marked and destined to a point beyond, authorizes him so

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to forward the goods; *and that third persons are not bound to look beyond the mere fact of such possession.* As if a line, running only from New York to Boston, but in the habit of forwarding thence to places beyond Boston, be intrusted with goods to Portland, Maine, *carriers from Boston to Portland may rightly presume, from the usual course of the business of such line, and the fact of possession, an authority so to forward upon the usual and customary terms.* This is in analogy to the ordinary rule in regard to agents engaged in a particular trade or business, and employed by a principal to do certain acts for him in the course of that business; in which case he will have power to bind the principal by all contracts which are within the scope of his ordinary employment, whether he had special private instructions or not. Having been enabled to hold himself out to others as possessing a certain authority, the principal will be bound by its exercise, whatever may have been the actual terms of the employment itself." 22 Wend. 348-361; 23 id. 22 and 280; 3 id. 83; 1 Hill, 501; 3 id. 269; 5 id. 101.

"Had it appeared, in the present case, that the Cincinnati line, with whom the contract in this case was made, were carriers from Cincinnati to Buffalo only, and forwarders from thence to New York; that this was their usual course of business, and this fact was known to the party forwarding the goods, or so notorious that he must be presumed to have known it, I should be much inclined to hold that, by intrusting the goods to such line, *he subjected them to the inferences justly drawn from the course of the carrier's ordinary employment, and that other carriers had a right to act upon the apparent authority thus conferred.*"

In this extract the learned judge has stated the very case here presented. The contract here was with the Pittsburg, Fort Wayne and Chicago Railway Company. It is not necessary to say that its name indicates its termini. It is not necessary to say that the termini of railways are matters of general and public notoriety. It is not necessary to say that their charters are public laws, authorizing their construction and operation between given points, and that, therefore, any person contracting with a railway company to carry goods beyond its termini, necessarily contemplates the employment by it of other carriers to that extent. All this appears explicitly on the face of this contract itself. For, even though it should be tortured into a contract to carry to Hudson, it nevertheless states that the limits of the railway were at Chicago. and that the goods were

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to be carried beyond that point through the agency of such other carriers, "whose line may be considered a part of the route to the place of destination." So that we have here not only all the conditions suggested by Judge WOODRUFF, but more. The shipper actually contracted for the employment of the other carriers beyond the terminus of the first company. So we have Judge WOODRUFF's authority, that these subsequent carriers had a right to assume, unless informed to the contrary, that the Pittsburg, Fort Wayne and Chicago Company had "the authority to forward upon the usual and customary terms."

What were these? They were that each successive carrier was to pay all back charges, according to the usual and customary rates. If, therefore, the first carrier does forward them upon those terms, the shipper is bound, so far as the rights of the succeeding carriers are concerned. They being guilty of no negligence, there seems no sufficient reason for any distinction between their right to a lien for their own freight and their right to a lien for the back charges, which they have paid according to such usual custom. If they could hold the goods for their own freight, although the entire freight had been prepaid to the first carrier, they ought, by the same reasoning, to hold them for the usual back charges. The reason on which the rule rests, in either case, is that the owner has intentionally caused the goods to be delivered to them for transportation, *knowing the custom*, and not taking due care to inform them that, by reason of a special agreement, it is not applicable to his goods. From the necessity of the case, such information must come to them, if at all, from the owner or from the first carrier. The latter, therefore, even though it is a through contract, must be held to represent the owner, so as to bind him for any neglect or default in not conveying to such independent carriers, whose employment the contract contemplated, such information as is proper to charge them with notice that the particular goods are not subject to the custom. And the reason of the rule extends as well to the payment of the usual back charges as to the freight which the other carriers may themselves earn.

If, according to the usual course of the business, a bill of lading or way-bill accompanies the goods, and contains this information, of course the succeeding carriers would be chargeable with negligence if they did not inform themselves of its contents. But, as already said, upon the facts stipulated here we cannot assume such

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to have been the case. We hold, therefore, that, even though this were a through contract, the independent carriers, whose employment was contemplated by the parties to it, receiving the goods without any knowledge of the special agreement, and not being chargeable with any negligence in not having such knowledge, were entitled to a lien, not only for their own freight according to the usual rates, but also for the usual back charges which they had paid.

But upon the theory that this was not a through contract, which is the true one, this conclusion becomes still more clear. It is then well settled, that each carrier, in employing the one succeeding him, acts as the mere forwarding agent of the shipper. *Darling v. B. & W. R. R. Co.*, 11 Allen, 295-297; *N. Railroad Co. v. F. Railroad Co.*, 6 id. 254; Story on Bailments, §§ 502, 537. This relation being conceded, the solution of the question is very clear. Those general principles, applicable to questions of agency, stated in the extract from Judge WOODRUFF's opinion, above quoted, become then directly applicable. The goods are then delivered to each carrier by the owner's agent. Each has the right to assume that such agent has the authority to forward the goods according to the usual course of the business. Such is his apparent authority. And if there are any private stipulations between him and his principal, modifying this authority in any respect, third parties, dealing with him on the faith of his apparent authority, without notice, are not bound by them. The fact, that in such case the forwarding agent acts for himself in collecting the charges, does not show that he does not also act as agent in communicating to the carrier who receives the goods the amount of back charges to be paid by him. The payment of those charges was, under the custom, a necessary condition to the delivery of the goods to him. And it was, therefore, within the scope of the forwarding agent's authority to inform him as to the amount of such charges. And for any mistake of his in that respect, the principal and not the innocent carrier should suffer.

The case of *Fitch et al. v. Newberry*, 1 Doug. 1, and of *Robinson v. Baker*, 5 Cush. 137, are cited to support the position that in all such cases the carrier receiving the goods takes the risk, not only of the agency of the one who delivers them, but also of his observing the exact letter of his private instructions. But while they do hold that he takes the former risk, they do not hold that he takes the latter. And there is a later case in which the supreme court of

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Massachusetts establishes the opposite rule, and comments on the case in the 5th of Cushing, showing that it has no application to such a question as is here presented. It was in the case of *Briggs v. The Boston and Lowell R. R. Co.*, 6 Allen, 246. The contract there was with the Racine and Mississippi Railroad Company, to forward and deliver flour in Williamstown, Massachusetts. By mistake of its agents it was billed to Wilmington, instead of Williamstown. The defendant carried it to Wilmington, and paid the back charges according to the usual course of the business. The court held that the shipper was responsible for the mistake of his own forwarding agent, and that the defendant had a lien, not only for its own freight, but for all the back charges. And in commenting on the case in 5th Cushing, they say that the same result would have occurred there, except for the fact that the party who misdirected the goods was not the forwarding agent of the owner at all, but had contracted to deliver them in Albany to a specific consignee.

Although this opinion is already too long, I cannot forbear quoting at some length from the opinion of the court in that case. They say: "The same person may be, and often is, not only a common carrier, but also the forwarding agent of the owner of the goods to be transported. Story on Bailments, §§ 502, 537. He must necessarily act in the latter capacity, whenever he receives goods which are to be forwarded, not only on his own line, but to some distant point beyond it on the line of the next carrier, or on that of the last of several successive carriers, on the regular and usual route and course of transportation, to which they are to be carried and there delivered to the consignee. The owner generally does not, and cannot always, accompany them, and give his personal directions to each one of the successive carriers. *He therefore necessarily, in his own absence, devolves upon the carrier to whom he delivers the goods the duty, and invests him with the authority, to give the requisite and proper directions to each successive carrier, to whom, in due course of transportation, they shall be passed over for the purpose of being forwarded to their ultimate place of destination. Otherwise they would never reach that place. For the first carrier can only transport the goods over his own portion of the line; and if he is not authorized to give the carrier, with whose route his own connects, directions in reference to their further transportation, they must stop at that point; for although, in general, every carrier is bound to accept and forward all goods which are brought and tendered*

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to him, yet he is not so bound unless he is duly and seasonably informed and advised of the place to which they are to be transported. Story on Bailments, § 532; *Judson v. Western Railroad*, 4 Allen, 520. Hence it results, by inevitable implication, that when an owner of goods delivers them to a carrier to be transported over his route, and thence over the route of a succeeding carrier, or the routes of several successive carriers, *he makes and constitutes the persons to whom he delivers them his forwarding agents*, FOR WHOSE ACTS IN THE EXECUTION OF THAT AGENCY HE IS HIMSELF RESPONSIBLE. And therefore, if the several successive carriers carry the goods according to the directions which are given by the forwarding agents, they act under the authority of the owner, and cannot in any sense be considered as wrong-doers, although they are carried to a place to which he did not intend that they should be sent. And in such case, the last carrier will be entitled to a lien upon the goods, not only for the freight earned by him on his part of the route, but also for all the freight which has been accumulating from the commencement of the carriage until he receives them, which, according to a very convenient custom, which is now fully recognized and established as a proper and legal proceeding, he has paid to the preceding carriers."

The principle of this decision is just as applicable to a case of misdirection by the forwarding agent concerning the amount of back charges to be paid by the succeeding carrier, as to a misdirection concerning the destination of the goods. Information on both subjects is within the scope of his agency, and therefore the principal must be responsible for his mistakes or defaults in respect to either.

Motion for a rehearing denied.

FOSHAY, appellant, v. THE TOWN OF GLEN HAVEN.

(25 WIL. 283.)

Liability of town for condition of highway—Obstructions.

Objects within the limits of a highway, naturally calculated to frighten horses of ordinary gentleness, may constitute such deficiencies in the way as to render the town liable, even though so far removed from the traveled path as to avoid all danger of collision. An instruction to the jury to the contrary of this rule is erroneous.

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ACTION for damages to plaintiff in consequence of defective and insufficient highway. The plaintiff, his horses and carriage were injured to the amount of \$3,000 (as is claimed in the complaint) by the horses taking fright at a certain "hollow, burnt and blackened log, lying close to the traveled part" of the highway on which he was driving, and without any negligence on his part. The plaintiff sought to make the town liable under section 120, ch. 19, R. S., which provides as follows:

"If any damage shall happen to any person, his team, carriage or other property, by reason of the insufficiency or want of repairs of any bridge, or sluice-way, or road, in any town in this State, the person sustaining such damages shall have a right to sue for and recover the same against such town in any court having jurisdiction thereof."

Verdict was rendered in favor of defendant, a new trial was denied, and plaintiff appealed from judgment on verdict.

Paine & Carter, for appellant.

Barber & Dewey, for respondent.

PAINE, J. There is one error for which this judgment must be reversed. It is in the following instruction given to the jury: "That an object existing within the limits of the highway, but leaving the traveled path unobstructed, so that the traveler is safe from collision with it, is not an insufficiency in the way, merely because it exposes the traveler's horse to become frightened at the sight of it, and the town in such case would not be liable." We adopt upon this subject the rule established by the supreme courts of Vermont, New Hampshire and Connecticut, that objects within the limits of a highway, naturally calculated to frighten horses of ordinary gentleness, may constitute such deficiencies in the way as to render the town liable even though so far removed from the traveled path as to avoid all danger of collision. The authorities are all referred to and commented on in a very able opinion by the supreme court of Vermont in the case of *Morse v. Richmond*, 41 Vt. 435.

The counsel for the respondent, while not denying this to be the law, endeavored to obviate the objection to the instruction under consideration, by so construing it as to avoid a conflict with the rule. If I correctly understood him, he claimed that it was correct to say

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that an object outside of the traveled path did not constitute a defect, merely because it exposed horses to be frightened, unless the object was naturally calculated to produce that result, and that the instruction as given did not include the latter proposition, and therefore could not be said to be wrong.

But such an interpretation overlooks the obvious meaning of the instruction. It was asked for by the defendant's counsel on the trial. It was designed to be applicable to the facts appearing in the evidence. The real legal question in the case was, whether an object in the highway, outside of the traveled path, calculated to frighten horses, constituted any such insufficiency as rendered the town liable. The evident object of this instruction was to tell the jury that it did not. It is well framed to accomplish that object, and such only is its natural interpretation. True, it does not expressly characterize the object referred to as one calculated to frighten horses. But it obviously assumes that fact. It would be wholly inapplicable and frivolous unless understood as referring to such an object. The very statement that an object exposes the traveler's horse to become frightened at the sight of it, implies that the sight of it might naturally produce that result. The word "merely," as used in it, does not relate to the degree of the tendency of the object to produce fright, as though the court had told the jury that an object was not necessarily a deficiency in the road, because it was barely possible that a horse might be frightened. But the word "merely" was used to distinguish between the liability to frighten horses, and other modes of causing injury. The plain meaning of the instructions seems to be, that where there is an object in the highway naturally calculated to frighten horses, no matter how great its tendency to produce that result, if that is the only objection to it, it is not such an insufficiency as to render the town liable. This was in conflict with the rule as above stated; and the judgment must be reversed, and a new trial had.

So ordered.

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MAY V. THE BUCKEYE MUTUAL INSURANCE COMPANY, appellant.

(25 Wis. 201.)

Fire insurance — effect of agent's neglect to correctly write down answers to interrogatories.

The defendants issued a policy of insurance on plaintiff's factory upon a written application, signed by him, wherein it was set forth, in answer to printed interrogatories, that the premises were worked during certain hours, that a night-watchman was always on duty, and that there was a force pump on the premises for putting out fires, and that it was always in condition for immediate use. The defendant's agent who effected the insurance was informed by the plaintiff at the time, that the factory was not run during the winter season, and that there was then no watchman kept, nor pump ready for use. The agent himself filled up the application, and wrote down such portions of plaintiff's answers as he considered material. The policy provided that "the company will be responsible for the accuracy of surveys made by its agents." The factory, having been burned during the winter season, the company denied its liability on the ground that the undertaking of the plaintiff regarding watchman and pump had not been complied with. *Held*, that the defendants were liable.

APPEAL from a judgment entered on a verdict for the plaintiffs in an action on an insurance policy.

The plaintiffs procured from the Buckeye Mutual Insurance Company a policy of insurance on their steam-power stave factory in Wrightsville, Wisconsin. The risk was effected through one Fisher, an agent of the company, who forwarded to the company a printed form of application, filled up and indorsed, as follows: Survey of stave factory at Wrightsville, Wisconsin, owned and occupied by Messrs. May & Co. This survey contained the name and residence of the applicants, the nature of the property sought to be insured, etc.; also written answers to the printed questions contained therein, the following of which only need be given:

"12. *Hours.* During what hours are the premises worked? (Six A. M. to seven P. M.; sometimes seven P. M. to six A. M.) How many hands employed? (About twenty.) 15. *Watchman.* Have you a night-watch always on duty? (We have.) Is the building left alone at any time after the watchman goes off duty in the morning until he returns to his charge at evening? (It is not.) Is any duty required of him other than watching for the safety of

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the premises? (None.) 19. *Force-pump*. Is there a force-pump upon the premises *expressly for putting out fire*? (There is.) Is it a good pump, and at all times in condition for *immediate* use? (It is.) How often is it tried to know if it is in order? (Every two or three days.)" * * * * Also the following covenant: "And the said applicants hereby covenant and agree to and with said company that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant, and are material to the risk." This application was signed by the plaintiffs in their firm name, and is referred to in the policy as the "warranty" of the insured, and "a part" of said policy.

The policy which was issued thereon contained the following conditions, which were made a part of the contract: "Applications for insurance must specify the construction," etc., "and a false description by the assured of a building, or of its contents, or the omission to make known any fact material to the risk, or, in a valued policy, an overvaluation, shall render absolutely void a policy issued upon such description or valuation. But the company will be responsible for the accuracy of surveys and valuations made by its agents.

"All persons insured by this company and sustaining loss or damage by fire are forthwith to give notice thereof to the company, and as soon after as possible to deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation," etc. "Whenever a policy is made and issued upon a survey, description or representation of certain property, such survey, description or representation shall be taken and deemed to be a part and portion of such policy and a warranty on the part of the insured, as fully as if the same were therein written or referred to."

The factory insured was burned in January following the insurance. The company refused to pay the loss on the ground that the insured had not complied with the warranty in the application in that, at the time of the fire, and for about thirty days previous, the premises were not worked, nor any watchman kept—nor force-pump in readiness as had been set forth in the application; also, on the ground that the insured forthwith give notice of the loss, nor

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deliver to the company a particular account of such loss, signed with their own hands and verified with their oath or affirmation.

At the trial it appeared that the application had been filled up, and the answers to the interrogatories written down by Fisher, the agent of the company; that he had gotten his information from visiting the property, and from statements of the plaintiff; also, that the plaintiff had informed the agent at the time of the application that the factory was not run during the winter, and that the answers about watchmen, force-pump, etc., only applied to the time when the mill was in operation.

On the question of notice and proof of loss, it appeared that three or four days after the loss, plaintiffs gave notice to Fisher, the agent, who prepared the proofs of loss, which were sworn to by one of the plaintiffs, and left with Fisher to be forwarded, but that said oath was not duly certified by a magistrate. Further, that about eight days after the fire, Fisher gave notice of loss to the secretary of the company, who replied: "You can forward proofs to this office for us to look over, but give no encouragement as to pay until I can look it over;" that Fisher forwarded the proofs, and that in April following, the secretary wrote to Fisher requesting him to tell plaintiffs that the company declined to pay the loss on the ground that they had not kept a watchman.

The court instructed the jury that it was plaintiffs' duty to give the company notice of loss forthwith, and that it was for them to say whether they did so; but that if the company, in subsequently directing its agent to receive and forward the proofs, and in all its negotiations with the plaintiffs did not raise any such question, but received the proofs, and passed upon the claim on other grounds without notifying plaintiff of any defect in proofs, then the jury might find that it had waived a strict compliance with the requirement of the policy in that regard. Also, that if the plaintiffs correctly stated to Fisher the present and future condition of the premises, and the latter had omitted to incorporate such answers and statements in the application, the company were liable for the omission and not the assured.

Verdict for the plaintiff, and from the judgment entered thereon defendants appealed.

Carpenter & Chase, for appellant.

The representations contained in the application were warranties

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of a continuance of the same state of things. *Clark v. Ins. Co.*, 8 How. (U. S.) 235; *Roberts v. Ins. Co.*, 3 Hill, 501; *Kennedy v. Ins. Co.*, 10 Barb. 285; *Jefferson Ins. Co. v. Cotheal*, 7 Wend. 72; *Stout v. Ins. Co.*, 12 Iowa, 371; *Tebbetts v. Ins. Co.*, 1 Allen, 305; *Glendale Woolen Co. v. Ins. Co.*, 21 Conn. 19; 19 N. Y. 179; 17 id. 391; 14 Mees. & Wels. 95; *Barrett v. Ins. Co.*, 7 Cush. 175; 16 Wis. 523.

The written contract cannot be changed by the conversations of the parties. *Brown v. Ins. Co.*, 18 N. Y. 385; *Jennings v. Ins. Co.*, 2 Denio, 75; *Higginson v. Dall*, 13 Mass. 96; 14 id. 12; 2 Allen, 569; *Finney v. Ins. Co.*, 8 Met. 348; *Lee v. Ins. Co.*, 3 Gray, 583; *Barrett v. Ins. Co.*, 7 Cush. 175; *Kennedy v. Ins. Co.*, 10 Barb. 285; *Chase v. Ins. Co.*, 20 N. Y. 52; 7 Gray, 261. The defendant did not waive the defects in notice and proofs by giving the case an examination. *Trask v. Ins. Co.*, 29 Pa. 198; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; *Cornell v. Ins. Co.*, 18 Wis. 387.

E. W. Keyes with *J. C. Hopkins*, of counsel for respondents.

PAINÉ, J. We shall not attempt to determine how far a plaintiff in an action on a policy of insurance is bound to introduce proof, in the first instance, of a continued compliance on his part with all the provisions in the policy, in order to avoid a motion for a nonsuit. It has been said by a writer on this subject, who refers to authorities upon the point, that he must, in the first instance, prove a compliance "with *express warranties and conditions precedent*." 2 Phillips on Insurance, p. 653. But these companies have adopted the practice of inserting a provision that every thing said by the assured in reference to the subject-matter should be considered as an express and continuing warranty during the life of the policy. And it would be intolerable, if, by reason of this, plaintiffs in such cases were bound, in the first instance, to introduce affirmative proof of the truth of every representation made, and of a continuous compliance with every answer as to the mode of using the property. There are some things which, from the nature of such contracts, are conditions precedent, and a compliance with which the plaintiff ought to prove, to establish a *prima facie* case. There are others which are from their natures conditions subsequent, or exceptions to the liability of the company, and which should properly be presented as defenses. And whether the companies, by inserting this provision that every thing said by the assured shall be an express

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warranty, can change the essential character of these provisions, and impose on plaintiffs the burden of proving affirmatively the truth of every statement made, in order to establish a *prima facie* case, may constitute a question of some interest when it becomes necessary to decide it.

But in this case the motion for a nonsuit was overruled. And the defendant assumed the burden of showing a non-compliance by the plaintiffs with all the conditions of the policy in respect to which a non-compliance was claimed. Both parties introduced fully their evidence upon this subject. The question then is, whether, upon the case as it was finally submitted to the jury, the appellant has any thing to complain of. It is a familiar rule, that even when, strictly speaking, a motion for a nonsuit ought to have been granted for some defect in the proof, yet, if it is overruled and the defect subsequently supplied, there is no ground for reversal.

The principal reason why the company denies its liability is, the alleged fact that the assured did not comply with the undertaking to keep a night watchman, and to keep the factory running, and to have the pump in constant readiness for use. The property insured was a stave factory worked by steam. This alleged undertaking of the assured to keep a watchman constantly, to keep the factory running through the life of the policy, and to have the pump always in readiness for use, is founded upon the answers to the questions ordinarily put in respect to the mode of using the property.

The answer to the question, "During what hours are the premises worked?" was, "From 6 A. M. to 7 P. M.; sometimes from 7 P. M. to 6 A. M."

To the question, "Have you a night watchman always on duty?" the answer was, "We have."

It was also stated that the building was not left alone at any time after the watchman went off duty in the morning until he returned at evening.

It was said, also, that there was a good force-pump on the premises expressly for putting out fire, and that it was "at all times in condition for immediate use." Also, that it was tried every two or three days to know if it was in order.

It may be true, as claimed by the appellant, that, according to the current of authority, these statements would be held to be continuing warranties that the same state of things should continue during the life of the policy. But it has always seemed to me that

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to apply that rule to cases of this character was to impose on the transaction a construction which it does not fairly or reasonably bear, and to make a contract for the parties which they did not make for themselves.

Both the questions and answers in such cases purport to relate only to the then existing condition of things. Notwithstanding this, it is entirely reasonable and just to say, that, in respect to those things that, according to the usual course of the business, are permanent and continuing, the parties intend to agree that they shall be kept in the same condition. The assured undertakes to make no changes in the condition of the premises or the mode of using them, outside of the usual mode of conducting the particular business.

But it seems to me a stretch of construction to say that the assured undertakes, by such answers, to continue to use the property, through the life of the policy, in the precise manner then indicated, though such continued use would be contrary to the well-known usage and nature of the particular business. Thus, suppose a policy should be taken in the summer for one year on a steamboat used in navigation. Suppose a similar class of questions should be put and answered. The owner is asked, "During what hours is the boat run?" He answers, "It is run night and day." He says that a regular watch is kept at all hours of the night; that there are pumps worked by the engine, ready at all times for immediate use to extinguish fires; and that a dozen hands are employed on the boat. Would there be any reason in holding that this was an undertaking by the assured that the same condition of things should exist through the winter months, when the boat was not used, but was frozen in the ice of some river? Manifestly not. It would be absurd to assume that the parties so intended or understood.

The same thing seems equally true here. It was proved that the factory was never run in the winter. This fact was well known to the agent of the company, and the assured knew that he understood it. It is true of most of the mills that are engaged in the great lumbering business of this State. When, therefore, a policy is taken out upon one of these mills, or a factory like this, while it is running, and questions are asked and answered truly as to the description of the property and the mode in which it is then used, it would be as unreasonable to say that they amounted to a warranty by the

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assured that the same state of things should continue during the winter months, when, according to the usual custom and course of the business, the property was not used at all, as it would be to say so in the case of the steamboat. I agree fully with the remarks of the circuit judge upon this point, who gave it as his opinion that the only reasonable construction of such a policy was, that "those provisions in relation to the number of hands employed, the force-pump and the night watch, related only to the time or season of the year when that mill, or those of a similar character, were operated."

Upon this subject I have given my own views, as, in consequence of other facts appearing in the case, it became unnecessary for the court to decide the question. There seems to be a conflict of authorities upon the point, and there are certainly some very respectable ones which would sustain the construction that I have suggested ought to be put upon this policy. See *Schmidt v. Insurance Co.*, 41 Ill. 295, and cases cited.

Those other facts are, that the whole truth in relation to these matters was fully disclosed to the agent of the company by the assured, and that he himself prepared the papers, filled up the application, and wrote down such portions of the answers as he considered material or important. The assured explicitly informed him that the night watch was kept, and the pump examined and kept in readiness for use only when the mill was running. This fully appears by his own testimony, and he says, probably with good reason, that he did not write that down in the answers, because he considered that the risk was much less when the factory was not running, even without any of these precautions, than it was when running with them all.

The recent cases upon this subject fully sustain the position, that, upon this state of facts, the company is responsible for the accuracy and omissions of its agent, even without any express undertaking to be so, and that it cannot avoid liability by reason of any discrepancy between the real facts as disclosed to him and his presentation of them in the papers. The tendency of modern decisions has been strongly to hold these companies to that degree of responsibility for the acts of the local agents which they scatter through the country, that justice and the due protection of the people demand, without regard to private restrictions upon their authority, or to cunning provisions inserted in policies with a view to elude just responsibility. See the following authorities: *Rowley v. Ins. Co.*, 36

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N. Y. 550; *Columbia Ins. Co. v. Cooper*, 50 Penn. St. 331; *Viele v. Germania Ins. Co.* (supreme court of Iowa), Western Jurist, October, 1868, 297; *Franklin v. Atlantic Fire Ins. Co.*, 42 Mo. 457; *Ins. Co. v. Schetteler*, 38 Ill. 166.

Some of these cases are directly to the effect that, upon the facts here presented, the company would be liable for a loss happening as this did, after the factory had stopped running, although there was no night watch, and no pump in readiness for use.

We think the same conclusion follows, in this case, from an express stipulation in the policy. The company there agrees, that it "*will be responsible for the accuracy of surveys and valuations made by its agents.*" Its counsel claim that the word "survey," as here used, means only that which was merely matter of measurement or description. But we think, whatever may be its strict meaning, it has acquired, in insurance cases, a general meaning which includes what is commonly called the application, which contains the questions propounded on behalf of the company, and the answers of the assured. It was evidently used in this general sense in this policy. It first states what the application must contain. It then declares that any false description by the assured, or omission to make known any fact material to the risk, shall render the policy void. And then immediately follows the provision above quoted: "But the company will be responsible for the accuracy of surveys made by its agents."

The context shows that the subject-matter to which this clause had reference was the application. And the entire provision relating to that subject was evidently intended to inform the assured what the application must contain, and for what failures he would be held responsible, but also to inform him that, where those applications were filled out by the agents, in accordance with the usual practice, the company would be responsible for their accuracy, where the facts were fully and truly represented to them. Notwithstanding what is said in *Denny v. Ins. Co.*, 13 Gray, 497, we think this was the evident meaning of the word "survey" as used in this provision. And the case of *Glendale Man. Co. v. The Protection Ins. Co.*, 21 Conn. 19, which was cited by the appellant upon another point, is a direct authority to show that the word has this general meaning. The court says, on page 32: "Fire policies are issued upon certain interrogatories and answers, denominated the *survey*, often extending over two or more pages, and embracing not only

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the present but the future condition of things, and the future conduct of the insured."

We have no hesitation, therefore, in holding that this is the true meaning and effect of this clause in the policy. And it only shows that in this case the company expressly assumed a responsibility, which, in the absence of such an assumption, the court, upon the facts of this case, would have imposed upon it. And the company in such case is held liable, not upon the ground that parol evidence may vary the written contract, but that the company is estopped from taking advantage of the blunders of its own agents to avoid liability, after it has itself received the full benefit of the contract.

In this case there is no ground for the objection that parol evidence is admitted to vary the contract, for the contract itself, in expressly providing that the company would be responsible for the accuracy of surveys made by its agents, evidently contemplated an inquiry into the question, whether the agent, in filling out the application, had accurately stated the answers of the assured.

In respect to the claim that the proof of loss was not in time, the court instructed the jury correctly, both as to what constituted a strict compliance with the provision, and what would constitute a waiver on the part of the company. The subsequent conduct of the company was fully sufficient to warrant the jury in finding a waiver, if there was any defect, and the secretary expressly testified that they made no objection upon that ground.

This disposes of all the questions that seem material to be noticed.

Judgment affirmed.

NOTE. — See *The Annapolis, etc., Railroad Company v. The President, etc., of the Baltimore Fire Insurance Company*, post.

In re Tarble.

IN RE TARBLE.

(25 Wis. 300.)

Jurisdiction of State courts — Military power — Habeas corpus.

The State courts have authority to inquire, upon a writ of *habeas corpus*, into the cause of detention of any prisoner held within the State by a military officer of the United States, and to order his discharge.

A minor, under the age of eighteen, enlisted, declaring himself over eighteen years of age, but not swearing to the statement, and subsequently escaped, and was arrested as a deserter. On petition of the father of the recruit a writ of *habeas corpus* was issued from a State court, and the prisoner discharged. *Held*, that the State court had jurisdiction. (DIXON, C. J., dissenting.)

WRIT of *habeas corpus* and *certiorari* to the court below.

Edward Tarble, *sub nomine* Frank Brown, enlisted in the United States army at Madison, Wisconsin, on the 27th of July, 1869, being then under eighteen years of age. The recruit represented himself to be twenty-one years and one month old, but did not swear to his statement. The oath of enlistment and allegiance was taken, and young Brown, *alias* Tarble, was duly enrolled a soldier in the United States service. He subsequently escaped, was reported as a deserter, and delivered himself up. The father of the said Tarble, on the 10th August, 1869, applied for a writ of *habeas corpus* to the court commissioner of Dane county, who granted the writ, procured the body, and, relying on section 2, chapter 25 of the acts of the 37th congress (which provides that no person under the age of eighteen shall be mustered into the United States service), discharged the prisoner. The act of congress referred to also provides that the oath of enlistment taken by the recruit shall be conclusive as to his age. The officer who held the prisoner then applied to this court for a *certiorari*, and the matter came here for review.

P. L. & J. C. Spooner, for petitioner.

G. W. Hazleton, United States district attorney, for respondent.

PAINÉ, J. This was a writ of *habeas corpus* to procure the discharge of a minor held in the custody of the recruiting officer of the

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United States as an enlisted soldier. On the hearing, the court commissioner made an order for his discharge, and the record is brought here by *certiorari*.

The only question pressed upon our consideration by the district attorney of the United States was, that of the jurisdiction of the State officer. With few exceptions, jurisdiction in this class of cases has been asserted and exercised by State judicial officers, and sustained by the highest State courts from the beginning of the government down to the present day. I shall not attempt any review of the numerous authorities on the subject. They are nearly all referred to in a note in 2 Abbott's National Digest, 609.

Upon principle, it has always seemed to me that the jurisdiction was very clear, and that it resulted necessarily from the very nature and scope of the writ of *habeas corpus*, and the absence of any provision in the federal constitution in any way abridging the well-settled power of the State courts over the writ, or exempting federal officers from its operation. This great writ is the ægis of personal liberty. It was established by the founders of constitutional freedom in England, and was ever upheld by them with a strong hand against all the encroachments of arbitrary power. None were so high as to be exempt from obedience to it, and none so low as not to be entitled to invoke its protection. And we must ever remember with sorrow, if not shame, the contrast between our own highest court and that of England, presented in the fact, that, while ours was denying to one of an oppressed race born on our soil the poor privilege of even suing for his rights in a federal court, the queen's bench sent abroad this writ into Canada to protect the liberty of one of that same race, who was a fugitive and a wanderer upon British soil.

The high, searching and imperative character of the writ was well settled and understood at the time of the adoption of the constitution of the United States. It was fully recognized by the provision that its privilege should be suspended only when, in cases of rebellion or invasion, the public safety might require it. The full power and jurisdiction to issue it was, at that time, a part of the undoubted sovereignty of the States. And as the constitution did not, in any manner, abridge that power, nor exempt federal officers from its operation, by all the settled principles of constitutional construction, the jurisdiction still remains.

Acting upon this theory, it has been asserted and exercised by

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most of the State tribunals, with little serious question, until the decision of the supreme court of the United States in the celebrated case of *Ableman v. Booth*, 21 How. (U. S.) 506. Although that case related to the discharge by a State court of a party in custody, under the final sentence of the district court of the United States, since its decision some courts have applied its general reasoning to cases where the party was detained by the mere ministerial officers of the federal government under color of authority, as in the *Spangler* case, 11 Mich. 298. Others have asserted that there was a distinction between cases of detention under the judgment of a judicial tribunal, and those of detention by mere ministerial officers, and have refused to apply the doctrine of the *Ableman v. Booth* case to the latter class. Such was the decision of Chief Justice DILLON, of Iowa, in the case of *Anderson*, 16 Iowa, 595. There is some plausibility in this distinction, and it has been often suggested, as will be seen by referring to the cases.

But my opinion is, that there is no solid distinction between the two classes, and that the doctrine of *Ableman v. Booth*, if true at all, is as applicable to one as to the other. Of course, in saying this, I include in those cases of custody under judicial sentence, only those where the court pronouncing the sentence had no jurisdiction; for in no other has any right to interfere ever been asserted. And, notwithstanding the many general remarks to the contrary in the opinion of the supreme court of the United States, this court, in the *Booth* case, never claimed any authority whatever to "revise," annul or set aside the judgment or proceedings of the federal court or officers. It was never guilty of the absurdity of claiming "paramount jurisdiction in the State courts over the courts of the United States." It was much easier to impute to it such a false position, and then answer that, than it would have been to have answered the reasoning upon which it really rested its decision. It proceeded upon a very familiar principle, and one uniformly acted on by all courts. That is, that whenever, in any court, in a case in which it has jurisdiction, the validity of the judgment of any other court is drawn collaterally in question, it must decide whether the court rendering it had jurisdiction. This familiar doctrine has never been more strongly asserted or acted on than by the supreme court of the United States. In *Williamson v. Berry*, 8 How. (U. S.) 540, that court said: "But it is an equally well-settled rule in jurisprudence, that the jurisdiction of *any court* exercising authority over a sub-

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ject may be inquired into in *every other court*, when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings. The rule prevails, whether the judgment or decree has been given in a court of admiralty, chancery, ecclesiastical court, or court of common law; or whether the point ruled has arisen under the laws of nations, the practice in chancery or the municipal laws of States."

The result at which the court arrived in that case, in exercising this undoubted right, was extraordinary indeed. It treated as a nullity, for want of jurisdiction, an order of the chancellor of New York, made under a law of that State relating to a matter wholly subject to State authority, and against the decision of the highest court of New York sustaining his jurisdiction. But it is obvious that no error in the result of the inquiry as to jurisdiction has any tendency to impeach the right to make that inquiry. That right exists from necessity, and, without its daily exercise by all courts, litigation could not be decided. It imports no assumption of authority by the court making the decision over the court the validity of whose judgment is passed upon. It imports no power to "revise, annul or set aside its judgments." The inquiry relates solely to the question of jurisdiction. If that existed, then the judgment, no matter how otherwise erroneous, is to have its full force and effect. The court, where it is drawn collaterally in question, can go no further. But if that did not exist, then there is nothing to "revise, annul or set aside." The judgment was, then, a nullity from the beginning. No doctrine in law is better settled than this. In truth, the decisions are uniform on the subject. In the case last cited, the opinion refers to the decisions of that court upon this point, and quotes from its opinions in *Elliott v. Peirsol*, 1 Pet. 340, as follows: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. *But if it act without authority, its judgments and orders are regarded as nullities.* They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered in law as trespassers."

That court suggests, in the Booth case, that this court could no more inquire into the legality of the imprisonment of a citizen of

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this State within its borders, under the order of a federal court, than it could send its writ into Michigan and inquire as to the legality of the imprisonment of a person there. It may be conceded that the State and federal judicial systems are distinct and separate, and independent of each other as those of different States. Such a concession is clearly contrary to the existence of that appellate jurisdiction over the State courts which the federal court has asserted and exercised. But the repugnance between the doctrine of the Booth case, now under consideration, and the existence of that appellate jurisdiction, will be hereafter noticed. I allude now to that illustration of the court simply to say that, if the validity of a judgment of a court of Michigan should be drawn in question in any court of this State, in the exercise of its ordinary jurisdiction, the court here could decide, and must necessarily decide, whether the court of Michigan had jurisdiction to render it. The fact that the two jurisdictions are utterly foreign to each other does not prevent either from deciding to that extent upon the validity of the judgments and proceedings of the other. Here, too, the federal authority is clear and emphatic. In the case of *Rose v. Himely*, 4 Cranch, 241, the court sustained the right of an American court to decide collaterally upon the jurisdiction of a court of *Santo Domingo*. The chief justice said: "The great question to be decided is, *was this sentence pronounced by a court of competent jurisdiction?*" At the threshold of this interesting inquiry a difficulty presents itself, which is of no inconsiderable magnitude. It is this: *Can this court examine the jurisdiction of a foreign tribunal?*" The latter question he answered in the affirmative, and, in discussing it, he said: "A sentence professing on its face to be the sentence of a judicial tribunal, if rendered by a self-constituted body, or by a body not empowered by its government to take cognizance of the subject it had decided, *could have no legal effect whatever*. The power of the court, then, is *of necessity* examinable to a certain extent by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power under which it acts must be looked into, and its authority to decide questions which it professed to decide must be considered." And again, he says: "Upon principle, it would seem that the operation of every judgment must depend upon the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined."

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Although all this doctrine is, as before remarked, entirely familiar, I have felt justified in thus quoting it from the supreme court of the United States, in order to show that when this court, in the Booth case, assumed the power, in the exercise of its ordinary jurisdiction, to issue the writ of *habeas corpus*, to pass collaterally upon the jurisdiction of the district court of the United States to pronounce the judgment under which Booth was imprisoned, it was not assuming any such unwarrantable or unheard-of power as it has been charged with doing; and that, on the contrary, whatever might be said as to the correctness of its decision, still, in exercising the right to decide the question, it was proceeding upon a principle universally recognized, and exercising a right that is and must of necessity be exercised by all courts. For there is no just reasoning upon which any distinction can be asserted between a *habeas corpus* and any other judicial proceeding or suit, in respect to the right of the court to decide upon the validity of the judgment of any other court that may be drawn in question.

It is true, that, as States have no extra-territorial jurisdiction, and each can, therefore, by the writ of *habeas corpus*, inquire into the legality of imprisonment only within its own limits, such a proceeding would be less likely to draw in question the validity of any foreign judgment, than would litigation concerning the rights of property. But this can make no possible difference in respect to the right of the court to decide the question, if it should arise. And although such a case may be very unlikely to arise, yet if any one should assert a right to imprison any person within this State under the judgment or order of a court of Michigan, or of any other State or country, it would scarcely be claimed that the entire separation of two sovereignties, and the absence of any power to review the judgments of such other court, would prevent this court from inquiring upon *habeas corpus* into the legality of such imprisonment.

But, under our peculiar system, where the State and federal governments, with their distinct judicial systems, exercise a divided sovereignty and jurisdiction over the same territory and people, such a question may well arise, as it did in the Booth case. And for this court, in that case, in the exercise of its acknowledged jurisdiction of the writ of *habeas corpus*, where the judgment of the district court was returned as the justification for Booth's imprisonment, to pass upon the question whether that court had jurisdiction to pronounce such judgment, was no more an usurpation of author-

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ity, than it would have been to have passed upon a judgment of a court of Michigan or any other State, if such had been set up in justification. The fact that the district court might render a valid judgment that would justify imprisonment in this State, and that no court of another State could do so, does not vary the question. That fact gives no validity to its judgment rendered without jurisdiction, and has no legitimate tendency to impeach the right of the State court to pass upon this question. And there is nothing in the relations between the federal and State governments, nothing in the conceded supremacy of the constitution and laws of the United States, nothing in the nature or character of the federal courts themselves, which can have any just effect to make their judgments an exception to that universal rule, which, as already seen, they have so emphatically asserted, or to place them on any different footing, in this respect, from that on which the judgments of all other courts must stand.

In a suit in a State court, involving a right of property, title is claimed through a sale under a judgment of a federal court. The State court, in deciding on the effect of the sale, must necessarily pass on the jurisdiction of the court by which the judgment was rendered. This court, in a civil suit, recently passed on the jurisdiction of a federal court to render a decree for the sale of a railroad on the foreclosure of a mortgage. There was no suggestion from any quarter, that, in doing so, it was exercising any unwarranted or unusual power, or assuming any authority to control, revise or annul the judgments of that court. Nor was it. As already said, it is a power constantly exercised by all courts. But it is precisely the same power that is exercised in a proceeding by *habeas corpus*, when the validity of a judgment under which the party is imprisoned is drawn in question. A judgment in a civil suit disposes of the title to property. A judgment in a criminal suit disposes of the prisoner's right to liberty. A civil suit involving the title to that property is the appropriate proceeding in which the jurisdiction of the court to render the one judgment may be drawn in question collaterally. A proceeding by *habeas corpus* may appropriately have the same effect as to the other. But the right of the State court to decide on the validity of the judgment in the latter case is as clear as its right in the former. It rests upon the same principles, and stands or falls by the same reasoning.

This court, in the Booth case, held the fugitive slave law, under

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which he was convicted, unconstitutional and void, and that, therefore, the jurisdiction of the district court over the subject-matter of the indictment failed. Whether it was right or wrong in this conclusion, or in subsequently denying the appellate jurisdiction of the supreme court of the United States, is immaterial, so far as the question under discussion is concerned. Both of those questions are entirely distinct from that of the right of the court to pass collaterally on the jurisdiction of the federal court, in the first instance. The latter is all that is now under consideration. And, in discussing that, I have the right to assume that this court may have been right in holding that the district court had no jurisdiction. The question is to be tested upon the assumption that federal courts *may* render judgments void for want of jurisdiction, and that federal officers *may* imprison persons without lawful authority. And the vital question is, whether, in such cases, the State tribunals are utterly powerless to relieve.

It is not my design to enter into any general vindication of the positions taken by this court in that case. I have considered it only so far as was material to the question now presented; and I have said what I have, concerning the nature and effect of a judgment void for want of jurisdiction, and the right of every court to treat it as a nullity, when drawn collaterally in question for the purpose of showing that there is no substantial distinction between the case of an imprisonment under such a judgment, and one of any other illegal imprisonment under pretense of authority from the United States, in respect to the right of the State court to inquire in the first instance by *habeas corpus* into its legality. There cannot well be any authority less than that afforded by a "nullity." There cannot well be any pretext of authority entitled to less consideration, than that which, in the language of Chief Justice MARSHALL, "has no legal effect whatever." If, therefore, the State court has the right in any case to go beyond the mere inquiry whether an authority is *claimed* under the United States — if it has the right to require the return to a *habeas corpus* to show a legal authority for the imprisonment, and not a mere claim of it, such right must extend to both of the classes of imprisonment that have been referred to.

Still, in the opinion of the supreme court of the United States, there was so much stress placed upon the fact that the imprisonment was under a judgment of the federal court, without seeming to take any notice of the real ground upon which this court pre-

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ceeded, or of the broad distinction between the right to review or set aside a judgment, and the right to inquire collaterally into the single fact of jurisdiction, that there is room for refusing to apply its general reasoning in that case to a case like the present, where the detention is by a mere military officer, without the judgment of any court.

But upon principle there is no distinction, and the jurisdiction of the State court extends to both. If there were no appellate jurisdiction, the argument of convenience in favor of the position that all questions as to the legality of imprisonment, under alleged federal authority, should be decided exclusively by federal tribunals, would be very strong. It would doubtless then have been held, that the judicial power of the United States over all cases "arising under the constitution and laws" was exclusive. But that appellate jurisdiction over the State courts exists. It was provided for by an act of congress at the very outset of the government. It has been steadily asserted and exercised by the federal court; and, though denied in a few instances by the State courts, may now be said to be universally acquiesced in. This being so, the argument of convenience against the right of the State court to decide, in the first instance, any question under the laws of the United States, arising incidentally in a proceeding by *habeas corpus*, as well as in any other judicial proceeding, loses all its force. And the denial of that right is utterly repugnant to the entire theory upon which this appellate jurisdiction is sustained.

That theory is, that the grant to the judicial power of the United States of cognizance of all cases at law or equity, arising under the constitution and laws of the United States, was *not* exclusive, and that neither this, nor any other, provision of the constitution deprived the State courts of the power to decide all such questions, whenever they should incidentally arise in the exercise of any jurisdiction which they then possessed. It will even be found, by referring to the proceedings of the conventions which framed and ratified the constitution, that the idea was very prevalent among its friends, that congress would leave the State courts to exercise all the subordinate federal jurisdiction, and not establish any inferior tribunals whatever. In the convention which framed it, after a resolution had been first adopted in such form as to make the establishment of inferior tribunals imperative upon congress, it was deliberately stricken out, for the avowed purpose of allowing the State tribunals

to decide all such questions in the first instance. And the friends of the establishment of inferior tribunals afterward procured the adoption of the clause, "that the national legislature be empowered to institute inferior tribunals," observing that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the legislature to establish or not establish them. Madison Papers, 798, 799.

And though the language of the provision, as finally adopted, was somewhat different, it was evidently supposed that it vested in congress merely that discretionary power, and still left it at liberty, if it saw fit, to leave the State tribunals to exercise, in the first instance, jurisdiction in all the cases which might otherwise be committed to the inferior federal courts. I know the supreme court has held that congress could vest no part of the judicial power of the United States in State courts. But such was clearly not the idea of the framers of the constitution, as seen by the proceeding already referred to, and by the fact that in the State conventions its friends defended it upon the assumption that it gave congress only such discretionary power, and that congress would, in all probability, in the exercise of that discretion, leave the subordinate jurisdiction wholly to the State courts. And where it was assumed that congress might establish inferior tribunals, the friends of the instrument nowhere claimed that their jurisdiction would be exclusive, but admitted that it would be concurrent only with that of the State courts, so far as any questions under the constitution and laws of the United States might be raised before the latter, in the exercise of any jurisdiction they then possessed. Chief Justice MARSHALL, who was a member of the Virginia convention, said: "The State courts will not lose the jurisdiction of the causes they now decide. They have a concurrence of jurisdiction with the federal courts in those cases in which the latter have cognizance." But it is idle to multiply evidences that such was the view then held. The existence of this concurrent jurisdiction is plainly contemplated by the constitution itself, fully recognized by congress in the judiciary act, providing for an appeal from the State courts, and admitted by the supreme court of the United States as the basis of its reasoning in support of such appellate power. The constitution carefully provided that the judges of the State courts should be bound by the constitution and laws of the United States. Why was this, if they were never to decide at all upon questions arising under them?

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The judiciary act provided, whenever the highest State court decided against "the validity of any treaty or statute of, or any authority exercised under the United States," for a review of such decision by the supreme court of the United States, upon writ of error; thus expressly assuming that the State courts may decide, in the first instance, upon the validity of any statute or treaty of, or authority claimed under the United States.

In *Martin v. Hunter's Lessee*, 1 Wheat. 342, the supreme court, in sustaining this appellate jurisdiction, say: "It must, therefore, be conceded that the constitution not only contemplated, but meant to provide for, cases within the scope of the judicial power of the United States, which might yet depend before State tribunals. *It was foreseen that, in the exercise of their ordinary jurisdiction, State courts would incidentally take cognizance of cases arising under the constitution, the laws, and treaties of the United States.* Yet to all these cases, the judicial power, by the very terms of the constitution, is to extend. It cannot extend by original jurisdiction, if that was already rightfully and exclusively attached in the State courts, which (as has been already shown) may occur; it must, therefore, extend by appellate jurisdiction, or not at all."

It appearing, then, that the framers of the constitution, the conventions that ratified it, the congress and the supreme court of the United States, have all united in asserting the existence of this concurrent jurisdiction — it having been exercised by the State courts, as well in *habeas corpus* as in other judicial proceedings, from the formation of the government down to the decision of the Booth case, how could it be said that this court, when, in that case, it exercised the power of deciding on the validity of an act of congress, was taking any unusual step, or guilty of any extraordinary usurpation? Certainly, there was no just foundation for such a charge.

That which was really unusual and extraordinary was, not that it assumed the power to decide upon the question, but that, in exercising that power, it decided against the validity of a law passed to sustain the institution of slavery. The public and judicial mind of the country was then in such a peculiar state upon that question, that it was doubtless this fact, together with the subsequent denial by this court of the appellate jurisdiction, which was, in truth, contrary to the entire current of authority, that so shocked the nerves of the venerable members of the supreme court, that they failed to

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perceive distinctly the real theory upon which this court had assumed the right to pass collaterally upon the validity of a judgment even of a federal court. Their opinion is certainly liable to the criticism, that, almost throughout, it confounds the distinction between an actual federal authority and a mere claim of it, and the distinction between the right of a court to pass collaterally on the question of jurisdiction in the proceedings of any other court, and its right to review and set aside such proceedings where jurisdiction was conceded. It assumed that this court claimed the latter power, and the power to discharge any prisoner held under an actual federal authority. And it gravely quoted our statute, expressly requiring our courts to remand the petitioner for a *habeas corpus*, whenever it appeared that he was held by process from a federal court in a case in which such court "had exclusive jurisdiction," as being repugnant to the theory on which this court had professed to proceed.

This mode of treating the subject certainly justified the remark of Attorney-General STANBERRY, in his official opinion in 1867, in answer to an inquiry from the secretary of the navy, when, speaking of this decision, he said: "*The language used in this opinion is not quite so specific as might have been expected.*" And it is worthy of remark, that the learned attorney-general not only fully sustained the jurisdiction of State tribunals in cases where the detention is by a mere ministerial officer without judicial process, but that he seems to confine the application of that decision to cases where the imprisonment is not only under process, but under valid process. He says: "Nor can I understand the language of the court in *Ableman v. Booth*, in reference to the exclusive jurisdiction of the United States, as applicable to any other jurisdiction, over persons restrained of their liberty, than that which depends upon *jurisdiction* acquired under process of the courts of the United States." It has never been claimed by any one, that the State courts had any right to discharge a person legally held in custody under the authority of the United States, either with or without process. But even that admission does not impeach their jurisdiction to inquire, by *habeas corpus*, whether he is so held. It only shows, that, when such fact appears, it is their duty to remand the prisoner. True, if the jurisdiction exists, they might decide erroneously as to the legality of the custody. What of that? The only result would be, that the very event contemplated and provided for by the judiciary act would have taken place. They would have decided erroneously

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“against the validity of an authority exercised under the United States.” That this might happen, the supreme court tells us, was foreseen. Even that part of its opinion in the Booth case, which reasons in favor of its appellate jurisdiction, fully shows this, and cannot be reconciled with its intimations that the State court had no right to decide upon the question at all. Speaking of the supremacy of the constitution, and the laws passed in pursuance of it, the court says: “The sovereignty to be created was to be limited in its power of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, *nor were the State judges bound to carry it into execution. And as the courts of a State and the courts of the United States might, and indeed certainly would, often differ as to the extent of the powers conferred on the general government, it was manifest that serious controversies would arise between the authorities of the United States and of the States, which must be settled by force of arms, unless some tribunal was created to decide between them finally and without appeal.*”

How could these controversies arise? how could the State and federal courts differ upon these questions, if the State courts were never to decide them at all? And there is no reasoning upon which their jurisdiction in *habeas corpus* proceedings can be distinguished, in this respect, from any other part of their jurisdiction. If it be said that the power might embarrass the military operations of the government, it may be answered, in the first place, that the exigencies of military necessity may justify an officer in temporarily disregarding a writ of *habeas corpus*, whether issued by a State or federal court, as was fully recognized by all the judges of this court in *The Kemp case*, 16 Wis. 359.

In the next place it may be answered, that, with the power to correct their errors by appeal, there can be no more serious objection to the existence of this jurisdiction in the State courts than in the inferior federal courts. The appellate jurisdiction makes them, to that extent, parts of one judicial system. And the facilities for the protection of liberty cannot be too great. It may be further answered, that the jurisdiction has been exercised by the State courts from the beginning of the government, without any serious detriment to the federal authority. And lastly, it may be answered, that even if any inconveniences could be shown to result from it, courts are not authorized, upon such grounds, to assume

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the functions of constitution makers, and import into the constitution new prohibitions upon the States. A prohibition upon this jurisdiction cannot be sustained upon any such principle as that upon which the means by which the federal government is carried on are held exempt from the operation of the taxing power of the States. There, the taxing power, if applicable at all, was applicable to that which was the rightful means of executing the federal powers. It was held inapplicable, upon the ground, that, from its nature, it was unlimited and uncontrollable, and, therefore, if applicable, might be carried to the extent of entire destruction of the means of carrying on the government. But here the question is not one of disregarding or burdening any rightful authority of the United States. It is a question merely of deciding, in the first instance, in the exercise of the ordinary jurisdiction of the State tribunals to protect the liberty of the citizen, whether any person, claiming to hold him under federal authority, has shown a valid authority. And this, instead of being a discretionary, uncontrollable power, like the taxing power, is a judicial power, vested in officers sworn to support the constitution of the United States, and whose decision may be reviewed by the federal court. This so clearly distinguishes the two questions, that there cannot be held to be any just analogy between them.

There is nothing in the exercise of this jurisdiction by the State courts that at all impeaches the supremacy of the constitution and laws of the United States, or derogates from the authority or dignity of federal officers. On the contrary, where two governments exercise a divided sovereignty over the same territory, there is a necessity, arising from the nature of the case, that the officers of either must, when called upon by a tribunal that has the right to inquire into the legality of imprisonment within that territory, show their authority. This necessity is expressly recognized by the supreme court of the United States in the Booth case. On page 523, they say: "The court or judge has a right to inquire, in this mode of proceeding, for what cause *and by what authority* the prisoner is confined within the territorial limits of the State sovereignty." And again: "This right to inquire by process of *habeas corpus*, and the duty of the officer to make a return, grows necessarily out of the complex character of our government, and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its powers, and each, within its sphere of action pres-

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cribed by the constitution of the United States, independent of the other. But after the return is made, and the State judge or court judicially apprised that the party is in custody, *under the authority of the United States*, they can proceed no further."

The fair interpretation of this language would require a *legal* authority to be shown. For, unless there is a legal authority, there is none at all. There is surely a distinction between an "authority under the United States" and a mere claim of such authority. And if the court, having this distinction in view, meant that the officer must obey the writ and show a legal authority for the detention, then there is no ground for controversy. It is true, they afterward said, that, if the party was wrongfully imprisoned, the federal tribunals alone could afford him redress. But even that remark could have full effect by confining its application to a case of imprisonment under a judgment of a court having jurisdiction, as the court held that to be. In such a case, although the imprisonment might be wrongful, on account of errors in the judgment, yet the State courts, having no power of review, could afford no relief.

But if the court meant to say that a mere claim of authority under the United States was to have all the effect of an actual authority—if it meant to say that a marshal, having the custody of a prisoner under a judgment void for want of jurisdiction (which that court itself has told us was a "nullity," and all who were engaged in executing it "trespassers"), might still properly resist the State authorities by force of arms to maintain such custody—the attorney-general of the United States did well not to extend that doctrine beyond the very facts to which the court applied it. That would seem to be to lose sight of the very remedy which that court tells us the constitution provided for differences of opinion between the State and federal courts, and to fall back upon the mode of settling such differences which they say the constitution designed to guard against.

To substitute for the inquiry, upon *habeas corpus*, whether there is a lawful authority for the imprisonment, the one whether there is a mere claim to it—whether the party holding the prisoner *thinks* he has a right—is incommensurate with the high character and function of the writ itself, and with a due respect to the sovereign power of the State to relieve against any imprisonment of its citizens within its borders which is without authority of law. And we have the concurrent testimony of those who framed and those who

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adopted it, of congress, of the State courts, and of the supreme court of the United States, prior, at least, to the Booth case, that the constitution contemplated that the State courts should exercise this power, and that any possible evils that might be apprehended from it were guarded against, not by withdrawing the power, but by providing for a review of their judgments by the federal court.

It appeared, from the evidence in this case, that the minor was under eighteen years of age. His enlistment was, therefore, unauthorized by any act of congress. It was suggested that the law makes the oath of the recruit conclusive as to his age. But it appears that the only oath taken by this recruit was the ordinary enlistment oath, which contains no statement as to age. We do not understand that the law intended to make this oath conclusive as to a matter not mentioned in it. But it is also usual, as was done in this case, for the recruit to sign a separate statement which does show his age. And the law must have intended that he should be concluded, if at all, only by swearing to that. It appears that charges for desertion had been forwarded by the recruiting officer, but it does not appear that any court-martial had been ordered, so that no question arises in respect to taking a prisoner from the custody of such a court. I think the State officer had jurisdiction, and that his order should be affirmed.

COLE, J., concurs in the above opinion.

DIXON, C. J., dissents, holding that jurisdiction of the writ of *habeas corpus*, in cases of this nature, is vested exclusively in the courts of the United States, and that the State courts cannot entertain the same.

Order affirmed.

Whiton v. The Chicago and North-western Railway Company.

WHITON V. THE CHICAGO AND NORTH-WESTERN RAILWAY COMPANY, appellant.

(25 Wis. 424.)

Constitutional law — Transfer of cause from State to United States court.

The act of congress of March 2, 1867, in so far as it gives a non-resident plaintiff the right to remove a cause from the State to the federal courts, is unconstitutional. (DIXON, C. J., dissenting.)

APPEAL from an order removing a cause into the United States courts.

The plaintiff, a resident of Illinois, brought this action as administrator of Mary F. Whiton, deceased, in the circuit court of Rock county, Wisconsin, to recover of defendants damages for the negligent and wrongful killing of his intestate.

The defendants operate a line of railway lying partly in Illinois and partly in Wisconsin, and has an act of incorporation in both States. The act causing intestate's death occurred in Wisconsin. During the pendency of the action the plaintiff obtained an order for its removal into the circuit court of the United States, and from this order defendants appealed.

Pease & Ruger, for appellants, to the point upon which the court rested its decision, that the act so far as it entitled the plaintiff to a removal is unconstitutional, cited *Moseley v. Chamberlain*, 18 Wis. 700 — plaintiff, having commenced his action in a State court, waived his right to invoke the jurisdiction of the federal courts. *People v. Murray*, 5 Hill, 471, 472; *Rogers v. Rogers*, 1 Paige, 185; Sedgw. on Stat. and Com. Law, 109-111; Cooley's Const. Lim. 181, 182; *Sayles v. Insurance Co.*, 2 Curtis' C. C. 213; *Seymour v. Judd*, 2 Coma. 467, 468.

Cruger & Sloan, for respondent, to the point that the act of congress is valid, cited *Abranches v. Schell*, 4 Blatch. 256; *Hodgson v. Milward*, 3 Grant's Cas. 418; *Mayor v. Cooper*, 6 Wall. 247.

COLE, J. The plaintiff applied for a removal of the cause into the circuit court of the United States under the provision of the act of

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congress of March 2, 1867. By this act it is provided that where a suit was pending when the act took effect, or might thereafter be brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in dispute exceeds the sum of \$500. exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, upon making and filing in the State court an affidavit stating that he has reason to and does believe, that, from prejudice or local influence, he will not be able to obtain justice in such State court, may, at any time before the final hearing or trial of the suit, file a petition in such State court for the removal of the suit into the next circuit court of the United States to be held in the district where the suit is pending; and, upon the provisions of the act being complied with in other respects, it is made the duty of the State court to accept the surety, and proceed no further in the suit; but the cause is to be entered in such court of the United States, and is to proceed therein in the same manner as if it had been originally brought there by original process. The application for removal was in conformity to this act. No objection is taken that it was informal in any respect, or that it came too late, and was not made before the final hearing and trial of the cause, within the meaning of the act of congress. But the order of removal is objected to upon other grounds. And first, it is argued and insisted, that the right to maintain this action did not exist at common law, but was given by sections 12 and 13 of said chapter 135; and that the right of action conferred by these provisions is not an absolute, unqualified one, which the party might enforce in the federal courts; but that he is confined in its pursuit to "some court established by the constitution and laws of this State." The 12th section, cited above, giving this action for damages caused by the negligent and wrongful act of another, notwithstanding the death of the person injured, contains the proviso, "*that such action shall be brought for a death caused in this State, and in some court established by the constitution of the same.*" It is claimed that this proviso clearly limits the plaintiff in the pursuit of this statutory action to the State courts, and, therefore, that the circuit court of the United States would not have jurisdiction of the cause if it had been originally instituted in the federal court. The argument in support of this view of the law is very able and elaborate; but on account of the view I entertain of the validity of the act of congress

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authorizing the plaintiff to remove the cause, I shall express no further opinion upon the point than to say, that I shall assume that the plaintiff might have brought his suit originally in the federal court.

Assuming, therefore, that the plaintiff had the right to bring this action originally in the federal court, I consider the act of congress, under which the application for removal was made, as invalid. It is true, the counsel for the plaintiff thinks there is hardly room for argument upon the question whether congress was authorized, under the constitution of the United States, to enact the act of March 2, 1867. And he claims, inasmuch as the 2d section of the 3d article of the constitution declares that the judicial power of the courts of the United States shall extend to controversies between the citizens of the different States, and there is here a controversy between citizens of different States, it was plainly competent for congress to provide (as it has done) for the removal of the suit by the plaintiff to the federal court at any time before an actual trial by a State court. But, without entering upon the much controverted ground as to the power of congress, when a citizen of one State is sued by a citizen of another State in the State court, to provide that the *defendant* may remove the cause into the federal court, it is quite evident that the power may be conceded in that case without establishing the power to provide for removal in the present one. For here the plaintiff, being a citizen of another State, had the right in the first instance to elect the forum for bringing his action. The parties stood in that relation to each other which, according to the provision of the constitution of the United States and the law of congress, entitled the federal courts to entertain jurisdiction of the controversy. The plaintiff had the right and privilege of bringing the action either in the State or federal court. This is assuming, that, although the subject-matter of the controversy arises out of our statute, still he was not bound to submit to the State tribunals for the enforcement of his right. Being a citizen of another State, the federal courts were open to him in which he might prosecute his action. While in this position, having both the federal and State courts open to him, he has made his election of the State court. And, by so doing, it seems to me that he has clearly waived the right of demanding the judgment of the federal court upon the matter in controversy. It is a principle well settled, that a party may waive a constitutional or statutory provision made for his bene-

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fit. And the plaintiff, by voluntarily submitting his cause to the State court, and asking the exercise of its jurisdiction, has waived the right to invoke the jurisdiction of the federal court. The jurisdiction of the federal courts in the case would have been founded entirely upon the character of the parties, and not upon the nature of the cause. None of those reasons, therefore, exist, which are generally relied on where that jurisdiction is founded upon the nature of the cause, to show the necessity for a supervisory control on the part of the federal tribunals over the decisions of the State courts. Nor does the case stand upon the same ground as where a citizen of one State is sued in the courts of another State. For, in the latter case, there is reason for saying, that, unless congress could authorize the removal, the judicial power of the United States might be eluded at the pleasure of the plaintiff, and the non-resident defendant be deprived of that security which the constitution intended in aid of his rights. But no such reasons can be urged in favor of the act under consideration. Because, assuming that the State and federal courts had cognizance of the matter in controversy between these parties, the plaintiff has made his election of the State tribunal. He was well aware, at the outset, that he might institute his suit in either forum, and, having made his choice of the State court to decide the controversy, let him abide its decision. What earthly ground is there for saying that the federal government may interfere, under such circumstances, and divest the State court of a jurisdiction already attached at the instance of the plaintiff? There is no principle better settled, than that where two or more tribunals have concurrent jurisdiction over the subject-matter and the parties, the court that first acquires it can hold fast on the case to the exclusion of the concurrent court. And although this principle has been departed from under our complex system of government, in the case of a non-resident sued in a State court, or where the nature of the controversy gave the federal courts final jurisdiction, yet this furnishes no reason for disregarding the principle where the non-resident plaintiff has seen fit to invoke the jurisdiction of the State court. In that case let him abide the consequences of the election thus voluntarily made, like any citizen of the State. For certainly "all the purposes of the constitution of the United States will be answered by the erection of federal courts, into which any party, plaintiff or defendant, concerned in a case of federal cognizance, may carry it for adjudication." And when the non-resident plaintiff,

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having the option, has appealed to the State court instead of the federal tribunal, can congress divest the jurisdiction already attached, by giving the plaintiff the right to remove the cause into the federal court? It seems to me that, in principle and reason, it should be held that the plaintiff, by bringing his suit in the State court when he might have brought it in the federal court, has clearly waived his right to appeal to the latter tribunal, and that this waiver binds him through the litigation. As plaintiff, he has voluntarily elected the jurisdiction of the State court, and there is no hardship in requiring him to abide its decision. I know of no provision in the constitution of the United States which gives congress the power to intervene, and authorize the plaintiff to divest a jurisdiction which he has himself invoked. Upon these grounds, I hold the clause in the act of March 2, 1867, which gives the plaintiff the right to remove the cause from the State to the federal court, not in pursuance of the constitution of the United States, and therefore void.

I therefore think the order of the circuit court appealed from must be reversed, and the cause remanded for further proceedings according to law.

Order reversed.

DIXON, C. J., dissenting.

PICKETT V. SCHOOL DISTRICT NO. 1, TOWN OF WIOTA, ETC.,
appellant.

(26 Wis. 551.)

Contracts—powers of trustees.

The plaintiff obtained a contract for building a school-house for the district of which he was a director, and took part in the proceedings of the board which let the contract. *Held*, that the contract was void, on the ground that it was against public policy to allow the plaintiff, while holding a fiduciary relation to the district, to place himself in an antagonistic position and obtain the contract for himself from the board of which he was a member.

APPEAL from the circuit court of La Fayette county.

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The plaintiff was a director of School District No. 1, in the town of Wiota, and, while holding this position in 1858, effected a contract, under seal, with the clerk and treasurer, the other members of the board, for building a school-house, by which it was agreed that the house should be finished by the first of June following. A portion of the work was unfinished at the time specified, and never was finished. The plaintiff claimed that his failure to finish the house was due to the defendant's neglect to comply with certain conditions, and brought this action to recover for the amount of work done, at contract price, after deducting \$78 already paid him. The principal question was as to the validity of the contract. There was a verdict for the plaintiff; a new trial was denied; and defendant appealed from judgment on verdict.

Henry S. Magoon, for appellant, urged that the contract was void, on the ground that the fiduciary relation of plaintiff precluded his entering into any such contract, citing *Dunlap's Paley*, 10; *Story on Agency*, § 210; 1 *Parsons on Cont.* 74, 75; *Stone v. Hayes*, 3 Denio, 579; *Morrison v. Railroad Co.*, 52 Barb. 173; *Abbott v. Am. Rubber Co.*, 33 id. 578; *Van Epps v. Van Epps*, 9 Paige, 241; *Wormley v. Wormley*, 8 Wheat. 421; 1 *Russ. and Myl.* 53; 11 *Bligh*, 397, 418; 4 *East.* 577 n.; 3 *Story C. C.* 181, 290; 1 *Story's Eq. Jur.* §§ 315, 316, 465; *Willard's Eq. Jur.* 605.

P. A. Orton, Jr., for respondent, urged the competency of the majority of the board to make the contract with any one, and the ratification of the contract by the district, citing *Mills v. Gleason*, 11 *Wis.* 470; *Cady v. Watertown*, 18 id. 323.

PAINE, J. We think there is one fatal objection to the plaintiff's right to maintain this action, which renders it unnecessary to consider any of the other questions discussed. That is, that inasmuch as it appears that the plaintiff was himself the director of the district at the time the contract was let, and took part as such in the proceedings to let it, it was against public policy to allow him, while holding that fiduciary relation to the district, to place himself in an antagonistic position, and obtain the contract for himself from the board of which he was a member. The general principle upon which this proposition must rest is, that no man can faithfully serve two masters, whose interests are in conflict. And as men usually and

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naturally prefer their own interests to those of others, where one attempts to act in a fiduciary capacity for another, the law will not allow him, while so acting, to deal with himself in his individual capacity. This principle has been most frequently illustrated in cases of sales by officers, agents and trustees, in all of which it has been held that they cannot become the purchasers, because this would allow their interests to come in conflict with their duties to their principals. The same doctrine is as applicable to the question of taking a contract as to that of making a sale. And the only doubt would be, whether it should be held applicable in a case where a board, consisting of several, are authorized to act in a fiduciary capacity, and attempt to deal in that capacity with one of their own members. I think it is; and that, although the impropriety of it would not be so glaring as in the case of a single agent dealing with himself, yet the danger of undue and improper influences, and of frequent sacrifices of the interests of the principal in a manner not always open to detection, would be extremely great.

I have found several well-considered cases where the doctrine has been so applied. In *Cumberland Coal Co. v. Sherman*, 30 Barb. 553, a very elaborate opinion was given by Justice DAVIES, in which the whole subject was very fully considered. In relation to this precise point, commencing on page 572, he says:

“Neither are the duties or obligations of a director or trustee altered from the circumstance that he is one of a number of directors or trustees, and that this circumstance diminishes his responsibility, or relieves him from any incapacity to deal with the property of his *cestui que trust*. The same principle applies to him, as one of a number, as if he were acting as a sole trustee. It is not doubted that it has been shown that the relation of the director to the stockholder is the same as that of the agent to his principal, the trustee to his *cestui que trust*; and out of the identity of these relations necessarily spring the same duties, the same danger and the same policy of the law.

“In the language of the plaintiff’s counsel, it is justly said: ‘Whether it be a director dealing with the board of which he is a member, or a trustee dealing with his co-trustees and himself, the real party in interest—the principal—is absent; the watchful and effective self-interest of the director or trustee, seeking a bargain, is not counteracted by the equally watchful and effective self-interest of the other party, who is there only by his representatives; and the

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wise policy of the law treats all such cases as that of a trustee dealing with himself.' The number of the directors or trustees does not lessen the danger or insure security that the interests of the *cestui que trust* will be protected. The moment the directors permit one or more of their number to deal with the property of the stockholders, they surrender their own independence and self-control. If five directors permit the sixth to purchase the property intrusted to their care, the same thing must be done with the others if they desire it. Increase of the number of the agents in no degree diminishes the danger of unfaithfulness. *Whitecote v. Lawrence*. 3 Vesey, 470, was a case of several trustees. In this case Lord LOUGHBOROUGH says: 'There was more opportunity for that species of management which does not betray itself much in the conduct and language of the party, when several trustees are acting together. I am sorry to say there is greater negligence where there is a number of trustees.'"

This entire extract seems to me directly applicable to the case of a school director taking a contract from the district board, like the one under consideration.

The general subject is also fully considered in a late edition of *Story on Agency*, with notes by Redfield and Herrick. See § 210 *et seq.* On page 251, in the notes, the case of the *Aberdeen Railway Co. v. Blaikie*, decided by the house of lords in 1854, is referred to, and it is also directly applicable. It arose upon a contract by a manufacturer to supply iron furnishings to a railway company of which he was director or chairman at the date of the contract. Lord CRANWORTH, in delivering the opinion of the court, says: "A corporate body can act only by agents, and it is of course the duty of these agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character toward his principal, and it is a rule of universal application, that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is or may be impossible to demonstrate how far, in any particular case, the terms of such a contract have been the best for the *cestui que trust* which it was possible to obtain. It may sometimes happen that the terms on which a

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trustee has dealt, or attempted to deal, with the estate or interests of those for whom he is a trustee, have been as good as could have been obtained from any other person; they may even at the time have been better. But still so inflexible is the rule that no inquiry on that subject is permitted. The English authorities on this subject are numerous and uniform."

In the case of *The People v. The Township Board of Overysel*, 11 Mich. 222, the court applied the same principle to a contract for the construction of some public works for several towns, which was let by a "harbor committee," acting for the towns, to several contractors, a portion of whom were members, though a minority, of the committee, and participated in the proceedings.

MANNING, J., said: "All public officers are agents, and their official powers are fiduciary. They are trusted with public functions for the good of the public—to protect, advance and promote its interests, and not their own. And a greater necessity exists than in private life to remove from them every inducement to abuse the trust reposed in them, as the temptations to which they are sometimes exposed are stronger, and the risk of detection and exposure is less." And again he says: "We think it no exception to the rule we have stated, that all the contractors were not members of the board of freeholders, or that those who were members were a minority of the board. The rule would not amount to much if it could be evaded in any such way. It might almost as well not exist as to exist with such an exception. The public would reap little or no benefit from it."

The opinion of CHRISTIANCY, J., also comments on the same point, and shows very clearly the danger to be apprehended if such contracts were permitted, not only from the direct power of the contractors as members of the board, but also from their influence upon the other members. And it is obvious that this latter species of influence is equally to be apprehended, even though the contracting member does not act as a member of the board in letting the contract.

It appears in this case that the plaintiff participated in the proceedings to let the contract. The notice for proposals was signed by him as director. He did not actually sign the contract as a member of the board, but the evidence leaves no doubt that he actively exerted himself to secure it. The clerk testifies that it was signed by the other members at the plaintiff's importunity, and that

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plaintiff flew into a rage when the clerk objected to signing it. We do not intimate that it would make any difference, even if it did not appear that plaintiff acted at all as a member of the board in the transaction, or used any effort to influence the others. But here it appears that he did both; and the case is clearly within the principle supported by the decisions above referred to.

Our statute, which was in force at the time, declaring that "all words purporting to give a joint authority to three or more public officers or other persons, shall be construed as giving such authority to a majority of such officers or other persons," etc., does not affect the result. It would, of course, enable the majority of the board to act and make a valid contract, in the absence or against the vote of the minority. But it had no design to abrogate the general principle above referred to, and allow the minority to place themselves in positions where their interests are in conflict with their official duties, and secure contracts for themselves from the majority.

In the case in Michigan, although the contract had been fully executed by the contractors, the court held it void as against public policy, and refused to issue a *mandamus* to compel the town to issue bonds in payment. We have not in our library the original report containing the English case above referred to, so that we do not know what was the nature of the action, or how the question arose. But the note from which we quoted states that the house of lords held that the contract "was invalid, and not enforceable against the company."

Still, there seems ground for a distinction between contracts which are held to be against public policy, merely on account of the personal relations of the contractor to the other parties in interest, and those which are void because the thing contracted for is itself against public policy. In the latter class the parties acquire no rights which can be enforced either in the courts of law or equity. But in the former, the thing contracted for being in itself lawful and beneficial, it would seem unjust to allow the party who may be entitled to avoid it, to accept and retain the benefit without any compensation at all. And it is accordingly held, in all those cases where agents or trustees empowered to sell attempt to purchase for their own benefit, not that the sales are absolutely void and pass no title, but that they may be avoided by the principal, who may have them set aside in equity, if, after a knowledge of the facts, he so elect. Story on Agency, above cited, page 246, note 2.

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In such cases the trustee or agent, if the sale or contract were avoided, would get his money back. The principal could not take the money and avoid the sale too.

And, perhaps, the true theory is, that, in all cases where the principle we have discussed is applicable, the contract is rather voidable in equity at the option of the principal than absolutely void at law. So that, in a case like this, the defense would be, under the present practice, an equitable one.

Undoubtedly in such cases the principal, having full knowledge of all the facts, may affirm the contract. And if he should do so, it would become binding. If it had been fully executed by the contracting party, and the principal should, knowing all the facts, elect to accept and retain the benefit of it, he might be held to have thereby ratified it, according to all its terms and conditions. And where it had not been so executed, but had been partially fulfilled, and he elected to accept and retain such partial benefit, he might become liable, on a *quantum meruit*, upon the same principles as in other cases.

But it appears here that the contract never was fulfilled by the plaintiff. The district, after expending a considerable sum to complete the school-house, used it and gave the plaintiff an order for \$175.00. If upon these facts he had any claim upon them, it would have been upon a *quantum meruit*, as the contract was not so legally binding on the district that their neglect to comply with it constituted a sufficient excuse for the plaintiff's non-fulfillment. As this claim on a *quantum meruit*, if any existed, was long since barred by the statute of limitations, and as this action can be maintained only on the contract, it cannot be sustained.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

THE ANNAPOLIS AND ELKRIDGE RAILROAD COMPANY, appellant,
v. THE PRESIDENT AND DIRECTORS OF THE BALTIMORE FIRE
INSURANCE COMPANY.

(23 Md. 37.)

Fire insurance — construction of policy.

The Baltimore Fire Insurance Co. issued a policy of insurance to a railway company, insuring "two Murphy & Allison passenger cars, *contained in* car house No. 1, and engine J. H. Nicholson, *contained in* engine-house No. 2." One of the cars and the engine, described in the policy, having been subsequently damaged by fire while making a regular trip on the line of the railway, in an action on the policy, *held*, that the words "contained in" were designed to restrict the risk to the property, while actually inside of the car and engine-houses, specified in the policy; and that the railway company could not recover for the loss.

ACTION on a policy of insurance against fire. The facts are stated in the opinion.

The plaintiffs prayed: 1. That they were entitled to recover, although the burning occurred while the car and engine were outside of the house designated in the policy, and engaged in the usual business of the road. 2. That, the first prayer having been granted, the amount of the recovery should be the actual loss, not exceeding the amount specified in the policy, with interest. The prayers were not granted; judgment was rendered for the defendant; plaintiff appealed.

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Alex. Randall and *Thomas Donaldson*, for appellant, argued that a liberal construction should be put upon the policy; and that the words "contained in" were merely descriptive, and not restrictive, and cited *Davison & Lymington v. Washington Fire Ins. Co.*, 30 Md. 91; *Fitchburg R. R. Co. v. Charlestown Mut. Ins. Co.*, 7 Gray, 64; *Allen v. Charlestown Mut. Ins. Co.*, 5 id. 384; *Gloucester Manuf. Co. v. How. Fire Ins. Co.*, id. 497; *Crosby v. Franklin Ins. Co.*, id. 504; *Maryland Ins. Co. v. Bossiere*, 9 G. & J. 121; *Allegre v. Maryland Fire Ins. Co.*, 6 H. & J. 408; *Baltimore Eq. Soc. v. Jolly*, 1 id. 295; *Phoenix Ins. Co. v. Cochrane*, 57 Penn. 143; *City Ins. Co. v. McLaughlin*, 53 id. 487; *Merrick v. Germania Co.*, 54 id. 282; *Cumberland Valley Mut. Pro. Co. v. Schell*, 29 id. 31; *Wall v. Han. Ins. Co.*, 14 Barb. 383; *Dole v. Marine Ins. Co.*, 6 Allen, 385; *Roth v. City Ins. Co.*, 6 McLean, 324; *Beebe v. Hartford Ins. Co.*, 25 Conn. 51; *Stokes v. Cox*, 38 Eng. L. & Eq. Rep. 437, and others.

S. Teackle Wallis and *William Schley*, for appellee, argued that the phrase "contained in" was restrictive, not descriptive, and cited *Moadinger v. Mechanics' Fire Ins. Co.*, 2 Hall, 490; *Boynton v. Clinton and Essex Ins. Co.*, 16 Barb. 254; *Railroad Co. v. Charlestown Mut. Ins. Co.*, 7 Gray, 64; *Lycoming Co. Ins. Co. v. Updegraff*, 40 Pa. 321; *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; *Bull v. Schuberth*, 2 Md. 38; 1 Starkie's Ev. 404-416; *Parsons on Mercantile Law*, 494; *Duer on Insurance*, 176, 182.

GRASON, J. On the 26th day of January, in the year 1864, the appellant procured its buildings and certain cars and engines to be insured by the appellee, and among the property thus insured were two Murphy & Allison passenger cars, "contained in car-house marked No. 1," and engine Joseph H. Nicholson, "contained in the engine-house marked No. 2." After the insurance one of the Murphy & Allison cars thus insured was entirely destroyed, and the engine Joseph H. Nicholson was greatly damaged by fire, while on the line of the railroad of the appellant, making one of its regular trips, between Annapolis and the Junction. For the damage sustained the appellant sued the appellee, and, the judgment being against it, this appeal was taken. The only question presented by the record, which we consider material to the decision of the case, is, whether the car and engine in question were covered by the policy of insurance when out of the car-house and engine-house described

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in the policy. It was urged by the counsel for the appellant that the words "*contained in*" were used as, and intended to be, merely descriptive of the car and engines covered by the policy, and were not intended to limit the risk of the appellee to the time during which the cars and engines were actually in the car and engine-houses. To support this argument, the fact that the cars and engines designed to be covered by the policy were all brought together at the Annapolis depot, and were *in the car and engine-houses at the time of the survey*, was relied upon. It will, however, be seen that the car-house was not capable of holding all the cars at the same time, and that one of them was not, in fact, *in the car-house* at that time. Nor were the words "*in the engine-house No. 2*" requisite to describe the engines, for the appellant had but the three, and they were designated by names, by which they could be accurately described, and by which they were insured. We think that the terms used in the policy were intended for something more than a mere description of the property, and that they must be construed as a limitation upon the risk assumed. But it was asked how the words "*contained in the car-house marked No. 1*" could be construed to limit the risk to the time when the cars were actually *in the car-house*, when it appeared that the car-house could not contain all the cars which were covered by the policy. This question, we think, is easily answered. The intention of the railroad company was evidently to insure their buildings and *their contents* against fire, there being much greater danger of fire to their buildings, located in a city and surrounded by other buildings, than to their trains upon the road and in charge of conductors and brakemen. While some of the cars which were insured were in use, others were not; but each car, in its turn, took its place in the car-house, and, while actually contained therein, was covered by the policy; so that, by the terms of the contract, the appellee would have been liable for all damage by fire to any of the insured cars or engines, which might have occurred while they were actually in the car or engine-house. In construing contracts of insurance, the courts will give effect to the intention of the parties, to be gathered from the terms of the contract itself, if not inconsistent with the established rules of law. *Patapsco Insurance Company v. Briscoe*, 7 G. and J. 294; *Maryland Insurance Company v. Bossiere*, 9 id. 121; *National Fire Insurance Company of Baltimore v. Crane*, 16 Md. 260. And every fact and

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declaration in the contract must be considered as the result of the design or agreement of the parties. 16 Md. 260. By construing the words "*contained in*" as a limitation of the risk assumed, we give effect to all the terms of the contract and to the intention of the contracting parties, as far as it can be gathered from the contract itself; and we think this construction is fully warranted by the cases of *Boynton v. Clinton and Essex Ins. Co.*, 16 Barb. 258, *Lewis and another v. Springfield Fire and Marine Insurance Company*, 10 Gray, 159, and *Lycoming County Insurance Company v. Updegraff*, 40 Penn. 322.

As this view of the case is conclusive against the appellant's right to recover, the court below was right in rejecting the first prayer. The second prayer was also properly rejected as a consequence of the rejection of the first, as well as because it asked the court to instruct the jury that the railroad company was entitled to recover the amount of its loss with interest from the time when the demand for payment was made, when, by the terms of the contract, the loss was to be paid *within sixty days after notice and proof thereof*.

As the judgment of the court below will be affirmed, it is unnecessary to notice the points raised by the exceptions of the appellee.

Judgment affirmed.

ROBINSON, J., dissented.

NOTE. — See *May v. Buckeye Mutual Insurance Company*, ante.

GARDNER, Guardian, *et al.*, appellants, v. MERRITT.

(23 Md. 78.)

Gift — when perfected.

The declaration of an intention to give, followed by delivery of the subject-matter of the intended gift to a bailee, for the benefit of the donee, constitutes a perfected gift.

A grandmother of several grandchildren, having stated that "she was going to put money in the bank for her grandchildren," deposited various sums of money in the savings bank to the credit of the grandchildren, and, in

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accordance with the by-laws of the bank relative to deposits by parents and guardians, caused them to be made subject to her own order or that of her daughter. On the death of the grandmother, her own daughter became executrix of the estate, and withdrew said sums of money from the savings bank and administered them as part of the estate. In a suit to obtain an accounting of the moneys so withdrawn and administered, *held*, that the deposits were perfected gifts, only liable to be withdrawn for the exclusive benefit of the donees, the grandchildren.

BILL to obtain an accounting of moneys wrongfully administered by an executrix. The facts are stated in the opinion of the court.

R. C. Prestman and *S. Teackle Wallis*, for appellants, argued that the grandmother had made the deposits as gifts to the children, although she had reserved control over them, and cited *Adams' Equity*, 80; *Cox v. Spring*, 6 Md. 274; 2 Redf. on Wills, 317, 318; *Hills v. Hills*, 8 Mees. & Wels. 401; *Edwards v. Jones*, 13 Cond. Eng. Ch. 377; *Mory v. Michael*, 18 Md. 227; *Kilpin v. Kilpin*, 1 Mylne & Keene, 520; *Fortescue v. Barnett*, 8 Cond. Eng. Ch. 208, and others.

Thomas Rowland and *E. G. Kilbourn*, for the appellee, argued that the funds still remained in the legal and equitable ownership of the depositor, and cited *Pennington v. Gittings*, 2 G. & J. 208; *Nickerson v. Nickerson*, 28 Md. 327; *Hitch v. Davis*, 3 Md. Ch. Dec. 266; *Thompson v. Dorsey*, 4 id. 149; *Cox v. Spring*, 6 Md. 274.

MAULSBY, J. Susanna A. Merritt, the grandmother of the appellants (complainants below), John G. Gardner, Mary V. Livingston, (formerly Gardner), Frances C. Gardner, Helen M. Gardner and Emma S. Gardner, deposited, during her life, sundry sums of money in the Savings Bank of Baltimore, to the credit of these complainants, having caused accounts to be opened in the bank in the name of each of them, as a minor, and containing immediately after the name of the infant, the words, "subject to the order of Susanna A. Merritt or Susanna Merritt." To these accounts she commenced on September 4th, 1860, to make deposits, and continued during the years 1861, 1862, 1863, 1864 and 1865, to November 13th, depositing equal sums, within a small fraction, to each account, and altogether to the amount, with the interest accrued and credited, when due, to each, of \$1,303.05.

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In December, 1865, she died, and after her death all these moneys were withdrawn from the bank by the appellee, and subsequently were claimed by her as belonging to the estate of Susanna A. Merritt.

The question is, whether these moneys became, when deposited by the grandmother, perfected gifts to the grandchildren, to whose account she had deposited them, or whether they remained, after the deposits, the property of the grandmother—whether the gifts were perfected, or whether the facts manifest an *intention* to give in future—whether the *acts* of making the deposits, under all the proof in the cause, divested the grandmother of her title to the moneys, and vested the same in the infants.

The vice chancellor, in the case of *Hughes v. Stubbs*, 1 Hare, 479, says: “The result of the cases is, that the court looks into the nature of the transaction, and determines, from the nature of the transaction, what the effect of it shall be in divesting the owner of the property to which it relates.” Before the moneys were deposited, they were the property of Mrs. Merritt. The proof is, that some time in or about the date at which she commenced to make these deposits—the date not definitely fixed by the witness—he declared that she “was going to put the money in bank for the children.” She did put money in bank, and caused it, when she so put it, to be entered to the credits or accounts of the several children. The 3d section of the charter of the Savings Bank, and the 1st and 7th of the by-laws, contained in the record, serve to show the character and intent of the acts of deposit by Mrs. Merritt. The corporation was empowered to receive from any person or persons any deposits of money, and to invest the same in public stocks, or other securities, and to allow interest, and to divide surplus profits. It was organized and incorporated for the purpose of receiving such small sums of money as are the profits of industry and economy, or legacies, or *donations* to widows, *children*, and others, etc.

Guardians may deposit for the benefit of their wards, and parents for the benefit of their children, and, if desired at the time of deposit, subject the same to the control of such guardian or parent. Mrs. Merritt must be presumed to have had knowledge of these provisions. She acted on them by depositing money for *the benefit* of her grandchildren, and subjected the same to the *order* of herself, or of her daughter, the appellee. It is maintained by the appellee that the moneys deposited did not become thereby the property of

the several infants, in whose names, or to whose accounts they were deposited, because they remained, by force of the words, "subject to the order of Susanna A. Merritt or Susanna Merritt," the property of the donor; that these words explained and limited the acts of deposit to the effect of a declaration of an intention to give in future. In the absence of those words, it would be hardly contended that the declaration of an *intention* to give, followed by actual delivery of the subject-matter of the intended gift, to a bailee, *for the benefit* of the donee, did not constitute a perfected gift. A gift is inoperative without delivery. To be valid, it "can have no reference to the future, but must go into immediate and absolute effect. To the perfection of a parol gift of a chattel, delivery is essential, and without actual delivery no title passes." *Nickerson v. Nickerson*, 28 Md. 332. The delivery may be to the donee, or trustee, or guardian acting for the donee, or to any bailee of the donee. All these conditions were met in this case. The money was delivered by the donor to the bank, as bailee of the infants, by the direction of the donor, that it should be entered to their credit in accounts standing open in their names. The words which are supposed to explain and qualify these acts of the donor are not, in our opinion, justly liable to that interpretation, but are to be interpreted in reference to the language of the by-law referred to. Guardians and parents may deposit *for the benefit of their wards and children*, and subject the deposits to the control of the guardians or parents. The deposits, when made by Mrs. Merritt, were *for the benefit* of her grandchildren. The delivery to the bank *for the benefit* of the grandchildren was a perfected gift to them, and the control, by *her* or *her daughter*, retained, was such control as is contemplated by the by-law — a control *for the benefit* of those to whose use, *or whose benefit*, the money was delivered — such control as might be necessary to the protection of the interest of the donees, and of the same nature as a guardian might exercise for the benefit of his ward, and not such control as would pertain to a continuing legal power and dominion over it—which would leave the donor a *locus penitentia*.

This construction of the effect of the words in question is sustained by a review of all the facts in the case. It is in proof, that, in 1858, Mrs. Merritt made a will; she devised all her property to her living children, the mother of the complainants being then dead, and excluded from all benefit of her estate these children of her dead

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daughter. The estate which she so devised had been given to her by all her children, including the then living mother of the complainants, by deed in 1846. In 1860, she commenced to deposit small sums, the products of the very property conveyed to her, in the savings bank, in the name and to the account of each of these excluded grandchildren. Prior to that time, she had been in the habit of giving to the mother, during her life, or to the father of these children, twenty-five dollars per month. She declared her intention to stop giving it to the father, and to put it in the bank for the children. There is proof that she had stopped giving it to the father, and had invested it in bank for the children—that she wished them, and not their father, to have it. It appears, from the accounts in evidence, that she deposited, to the account of each of the five children, five dollars per month, uniformly, in the earlier periods of the deposits, and generally at other times, though sometimes increasing and sometimes diminishing the monthly deposit.

There is in the record no evidence of any intent on the part of Mrs. Merritt to do any future act touching this money, after that of depositing it in the savings bank, for and in the names of her grandchildren. That she did not intend the act of deposit as a delivery for the use of the infants, when done, but that she then intended a future perfection of the gift, is an inference sought to be drawn by the appellee's counsel from the words, "subject to order," etc., only. During the same period, when she was making these deposits in the names of her grandchildren, she was also making similar deposits in the same bank in her own name; that is, she was depositing to separate accounts in the name of each of the grandchildren, and at the same time to a separate account in her own name, which had been opened long before, in 1856, and was continued until her death. If she intended that all the moneys were her own, and deposited to her own credit, it is hard to conceive her purpose in requiring five accounts to be kept, one in the name of each of the infants, and a sixth in her own name. It is argued that her purpose was to indicate thereby an intent to make future gifts of the moneys to the children, but there is no proof on which the argument can rest. The effect of the deposits was either to make the money deposited the right of the infant in whose name it was deposited, or the effect of the words "subject to her order" was to retain to her the legal power and dominion over it, and to continue it her own, as abso-

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lutely as if she had not caused it to be deposited in the name of the infants, and the multiplicity of accounts was without any meaning.

“If the donor has perfected his gift in the way which he intended, so that there is nothing left for him to do, and nothing which he has authority to countermand, the donee’s right is enforceable as a trust.” Adams’ Equity (marg.), 79.

“In every case the general purpose and intention of the donor, and not the use of one particular term or another, will decide the question of whether a party does or does not take in a fiduciary character.” Hill on Trustees (marg.), 66.

We think, in this case, that the donor had perfected her gifts, and had no design to countermand them, and that the right of the donees is enforceable, as a trust, against this defendant, who, in the words of the five distinct receipts signed by her, received from the savings bank the moneys *for* the complainants, naming each; who made some of the deposits at the request of her mother, who is shown by the proof to have been fully cognizant of all her mother’s acts and intentions in this respect, and who signed the receipt for the money standing to the separate account of her mother, as executrix.

The cases in 2 Gill & Johns. 208; 3 Md. Ch. Dec. 266; 4 id. 149, and 6 Md. 274, are all cases in which the gifts had not been perfected, and, in that respect, distinguishable from this.

The view which we take of this case is supported by those of Lord BROUGHAM, in *Kilpin v. Kilpin* and *Kilpin v. Lamb*, 1 Mylne & Keene, 520 (7 Cond. Eng. Ch. R., 150).

We have not adverted to some of the questions discussed by counsel, in their able arguments, particularly to the competency of the evidence of Mr. Baldwin, which was excepted to, because we have not found it to be necessary to the decision of the cause.

We are of opinion that the complainants are entitled to a decree for the several amounts of money which the appellee withdrew from the savings bank of Baltimore, and which stood to the credit of each at the time of such withdrawal, and to interest thereon from the 21st December, 1865, the date of the withdrawal.

The decree will, therefore, be reversed, and the cause remanded, that a decree may be passed in conformity with the opinion of this court.

Decree reversed and cause remanded.

Bradley v. The Potomac Fire Insurance Company.

BRADLEY, appellant, v. THE POTOMAC FIRE INSURANCE CO.

(23 Md. 108.)

Fire insurance — construction of policy.

The Potomac Fire Insurance Company issued its policy of insurance to B., stipulating therein that the company would pay all loss to the property insured resulting from fire, and not exceeding the amount specified, during one year from the date of the policy. There were further provisions in the policy, expressly providing that the company should not be held liable under the policy until the premium in full was actually paid, and that, if the premium was not paid within fifteen days from the date of the policy, it should be null and void. A loss by fire occurred to the property covered by the insurance after the delivery of the policy, but before the premium was paid and before the expiration of the "fifteen days." The insured, while the fifteen days were still unexpired, tendered the amount of the premium and claimed indemnity for the loss. *Held*, that actual payment of the premium, not only within the "fifteen days" but before loss, was necessary to render the company liable under the policy, and that the holder, not having fulfilled the conditions, could not recover for the loss.

ACTION on a policy of insurance against fire. The action was originally commenced in the superior court of Baltimore, but, upon application of the defendant, it was removed to Howard county. The facts appear in the opinion of the court.

John H. Thomas & William M. Merrick, for appellant, argued:

1. That, by the language of the policy, a credit of fifteen days was given for the payment of the premium, and cited *Mayor of New York v. Hamilton Fire Ins. Co.*, 10 Bosw. 537; *Ames v. New York Union Ins. Co.*, 14 N. Y. 253; *Hoffman v. Aetna Ins. Co.*, 32 id. 405; *Rochen v. Williamsburg Co.*, 35 id. 131; *Merrick v. Germania Ins. Co.*, 54 Penn. 277; *Yeaton v. Fry*, 5 Cranch, 335, 341; *Merchants' Ins. Co. v. Edwards*, 17 Grat. 138.

2. That a delivery of the policy was a waiver of the condition that full payment of premium should actually be made before the liability of the company would begin, and cited:

William Shepard Bryan, for appellee, argued that the liability of the company was conditional, and the condition precedent was a payment of the premium, and cited *Mulrey v. Shawmut Ins. Co.*, 4

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Allen, 116; *Strong v. Taylor*, 2 Hill, 326; *Henning v. Hoppock*, 15 N. Y. 409; *Tarleton v. Staniforth*, 5 Term R. 695, affirmed 2 Bos. and Pul; *DeWolff v. Babbitt*, 4 Mason, 294; *Deshon v. Bigelow*, 3 Gray, 159; *Haggerty v. Palmer*, 6 Johns. Ch. 437.

ALVEY, J. Whether the liability of the appellee under the policy sued on ever attached is the single question in this case, and that depends upon the true construction of the policy and its conditions.

The policy is dated the 11th of November, 1867, and by it, it is declared that the appellee, "in consideration of \$160, to be actually paid to this company within fifteen days from this date, by the insured hereinafter named, do insure Wm. L. Bradley, against loss or damage by fire, to the amount of \$4,000 on his property," situate at Roxbury, Mass.; and, in the clause that follows the description of the property, it is set forth that the company thereby "promises and agrees to make good unto the said insured, his, etc., all such immediate loss or damage, not exceeding, etc., as shall happen by fire to the property as above specified, during one year, to wit: from the 11th day of November, 1867 (at 12 o'clock at noon), until the 11th day of November, 1868 (at 12 o'clock at noon), the said loss or damage to be estimated," etc.

By the fourth condition of insurance it is provided that the company shall not be held liable under the policy, or under any renewal thereof, *until the premium in full therefor is actually paid*; and by the fifth condition it was mutually agreed that if the premium on the policy was not paid within fifteen days, as therein provided, the policy should be *null and void*; and it was further agreed that the policy was *made and accepted* in reference to the terms and conditions therein set forth.

At the trial below it was admitted that the policy sued on had been executed by the appellee and delivered to the appellant, on the day of its date, and that the proper preliminary proof had been furnished the company of the loss, and that \$160, the premium mentioned in the policy, had been tendered to the appellee by the appellant after the fire, and within fifteen days after the execution of the policy.

The court below ruled against the right of the appellant to recover on the policy, and to that ruling he excepted.

On the part of the appellant it is contended that the liability of the

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appellee attached from the date of the policy, and that the fifteen days given within which to pay the premium, was simply a credit extended to him, not at all intended to affect the risk, provided the premium was paid or tendered within that time; while on the part of the appellee it is contended that the actual payment of the premium, within the fifteen days, was a condition precedent to the attaching of the risk, and that, as the property was destroyed before the tender of payment within the time limited, there was nothing upon which the risk could attach, and, therefore, there is no liability for the loss; and this latter construction was the one adopted by the court below.

The question would seem to be a plain one; and the only thing that affords the slightest ground for the construction contended for by the appellant is the stipulation on the part of the company to insure the property against loss by fire, for the period of one year, reckoning that period from the date of the policy.

But though such be the stipulation, it was certainly competent to the parties to agree that it should be subject to the conditions that followed; and one of those conditions was that the company should not be held liable under the policy until the premium in full was actually paid. Until that was done, the policy, though issued and delivered to the appellant, was, in respect to the obligation under it, merely inchoate, depending for its binding effect upon a condition to be performed by the appellant. By the performance of that condition at any time within the fifteen days, and before loss occurred, the risk engaged to be assumed by the appellee would, *eo instanti*, have attached; but until such condition performed, the appellant held the policy at his own peril; and, upon loss occurring, no tender afterward made, though within the time allowed for payment, can, upon any fair construction, be taken as a compliance with the condition. For it never could have been the intention of the appellee to assume the risk before the payment of the premium, and to give the appellant the option to pay or not within the fifteen days as events might determine him to elect. If he had paid within the fifteen days, and before loss occurred, the appellee would have been bound to receive the premium and assume the risk; but, on failure to pay within the time, it was agreed by the fifth condition, that the policy should thenceforth be null and void, and, of course, being null and void, would be no longer binding on the appellee even as a proposal to insure. The policy being thus, by mutual agreement,

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declared null and void, in the event of non-payment within the time limited, it is clear, there could be no legal responsibility on the part of the appellant for the amount of the premium; and that being so, there is no reason or justice in holding the appellee alone bound on the contract for the fifteen days, while the appellant was free to elect to be bound or not, as circumstances might dictate. In so construing the policy as to bind the appellee from its date, without reference to the payment of the premium before loss, there would be no mutuality in the contract; and it is manifest that it was for the very purpose of preserving mutuality, and protecting the appellee from risk without consideration actually received, that the fourth and fifth conditions were inserted in the policy. Without such purpose in view they would be useless and unmeaning.

The cases cited and mainly relied on by the appellant have no application to this case. They were instances in which the insurers were held to have waived the right to receive the premium as a condition upon which the risk was to attach, upon the ground that the assured would have been otherwise misled and deceived. But such is not this case. Here the question is simply one of construction, depending on the terms of the contract between the parties; there being no pretense on the part of the appellant that he was deceived or misled by the conduct of the appellee. The only circumstance alluded to in argument, as at all justifying the notion of waiver, was the delivery of the policy to the appellant; but it must be recollected that, by express stipulation, the policy was *made and accepted* in reference to the terms and conditions contained in it.

Agreeing as we do with the court below in its construction of the policy, its judgment will be affirmed.

Judgment affirmed.

Rosenstock v. Tormey.

ROSENSTOCK, appellant, v. TORMEY.

(23 Md. 100.)

Stock broker and customer — evidence.

Where a broker purchases stock, through a correspondent, in pursuance of orders from a customer and in the usual mode of dealing, but the certificates are not called for nor the stock paid for, the broker, after waiting a reasonable time, may sell, or cause to be sold, the stock so purchased, on notice to the customer, and recover for the loss, if any, from the customer. In an action by the broker against his customer, to recover, in case of such loss, the letters of a correspondent in a neighboring city are incompetent as evidence to prove the purchase and subsequent sale of the stock in obedience to orders from the broker.

ACTION on the case to recover for loss, by a stock broker against a customer. The facts are stated in the opinion of the court.

Wm. H. Dawson and George H. Williams, for appellant.

Orville Horwits, for appellee.

MILLER, J. This action was brought by the appellee against the appellant and Louis Rosenstock and Jacob Hoflin jointly. The latter was returned *non est*, and the case proceeded against the other two. The declaration contains the common counts in *assumpsit*, to which the general issue was pleaded. The cause of action, according to the testimony offered by the plaintiff, arose thus: The plaintiff was a stock broker, doing business in the city of Baltimore, and, on the 4th of October, 1866, Nathan Hoflin, who for some time had been dealing with him in a similar way, under the name of J. Hoflin, came to the plaintiff's office and ordered him to buy one hundred shares of Illinois Central railroad stock on the joint account of J. Hoflin and his two co-defendants. The plaintiff immediately and, as he states, according to the course of trade and the regular custom of the business, wrote to his correspondents, Dibble & Cambloss, brokers in New York city, directing them to purchase, and they accordingly bought the stock at \$128 per share, and he paid them the purchase-money (\$12,825) therefor. The defendants failed to pay him, and subsequently, on the 16th of April, 1867, after notice to the defendants, and according, also, to the due course of trade

and the custom of the particular business, he directed Dibble & Cambloss to sell the stock in New York, and it was there sold by them and brought but \$11,400. The plaintiff now seeks to recover the difference between the amount thus paid in the purchase and that realized from the sale of the stock.

Before examining the questions raised by the exceptions, we deem it proper to state generally the legal relations, duties and obligations of the parties, growing out of this order, and what was necessary to be done in its execution, and the subsequent sale of the stock, to entitle the plaintiff to recover under the pleadings in this case. Assuming, for the present, that Hoffin was duly authorized to give the order for and on behalf of the defendants, the plaintiff thereby became and was constituted their agent to execute it, and if, by reason of its due execution, he expended money and incurred loss, he can recover it back from his principals under the count for money paid by him for them at their request. This is the sole count in the declaration relevant to the case as now presented, and only by sustaining that count can a recovery be had. The order is general in its terms, not directing the purchase to be made in any particular place or mode, and not containing any restrictions as to price. We are, therefore, of opinion the plaintiff had the right to make the purchase, as he alleges he did, in New York, through correspondents, brokers or sub-agents residing and doing business in that city. He must show, however, that the stock was actually purchased under his directions by his New York agents, at its fair market price on the day of purchase, and that he actually paid the purchase-money therefor. Having thus made the purchase and expended his money, it was his duty to notify his principals of the fact, and request them to receive the stock and pay him the price he had paid for it, with usual and reasonable commissions for making the purchase. At the time of this notice he must show he was in a condition to deliver or transfer the stock by having the certificates or other proper *indicia* of title actually in hand, or in the hands of his New York agents, ready to be delivered or transferred to the defendants. Upon receiving this notice, it was the duty of the defendants to pay for and receive the stock, and on their failure to do so the plaintiff had, in our judgment, the clear right, after a reasonable time and after giving notice to that effect to the defendants, to direct it to be sold in New York; and upon showing by legal and competent proof that it was actually sold by his agents,

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either at public sale in market overt or at a sale publicly and fairly made at the stock exchange or stock board, or a brokers' board where such stocks are usually sold, at its fair market value on the day of sale, he is entitled to recover from the defendants the amount, if any, of the resulting loss. In a transaction so conducted and carried out we discover nothing illegal or contrary to public policy. It is but the proper execution of a legitimate business order for the purchase of a valuable commodity—a common article of sale in the market, out of which legal rights and obligations arise which courts of justice will sanction and enforce.

Usage and custom of trade and business have been relied on by the plaintiff, who, in his testimony, says that in this transaction he had done all that was usual and customary in the purchase and sale of stocks, and had followed therein the due course of trade and the custom of the particular business of buying and selling stocks on orders. In a recent case decided by the court of exchequer, in 1869, *Maxted v. Paine*, 4 Law Rep. Exch. 210, some very forcible and pertinent observations on the subject of usages of the stock exchange were made by Baron CLEASELY. "I do not wish," says he, "to be understood as expressing an opinion that the plaintiff would be bound by any usage which a court of law would consider unreasonable. I think, on the contrary, he would not, unless he had actual notice when he authorized the contract to be made, of the particular usage. A man may, of course, if he thinks proper, make a contract with any stipulations in it which are not unlawful, as for instance, that he will not enforce it without the authority of some particular officer or committee; but such a usage would not, I think, bind a person having no connection with the stock exchange and no actual knowledge of its usages, simply because he employed a stock broker to contract for him, even though it was within the authority of the broker to make the contract on the stock exchange. It is true the jobber contracts with the broker according to the usages of the stock exchange, but if he knew, and he generally does know, that the broker was contracting for an outside principal, then he could not say as against that outside principal the contract is an act which according to our usages cannot be enforced. It seems to me that in the proper view it is a question of principal and agent, and what is the agent's authority. If the principal forbids the broker to bargain for him according to the peculiar usages of the stock exchange, and limits his authority to specified contracts, the

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broker could not bind him to a contract to be performed according to those usages. But if he does not limit his authority, then there is an implied authority to deal according to the usages of the stock exchange. But this, like other implied authorities, would be limited to such usages as are not unreasonable. Being implied by law it is in that way limited by the law; the law does not imply a contract or authority with terms which it regards as unreasonable. The members of the stock exchange, if they enter into ordinary contracts with strangers, cannot by their usages make the law inapplicable to them; rather the law as superior must apply to them, and it recognizes the usages as modifying the authority, but only so far as are reasonable. The contract having been made both parties are bound by it, not by the usage of the stock exchange, but by the power of the common law, and the usage of the stock exchange is properly introduced for the purpose of showing the manner in which the contract may be performed." So, in the case before us, the usage or custom of the particular business of buying and selling stocks on orders, in which the plaintiff was engaged, may be properly introduced for the purpose of showing the manner in which the order he received from the defendants may be performed, but not to imply an authority to execute it in a mode which the law would regard as unreasonable. The order is given to a stock broker to purchase certain shares of a particular stock by parties not shown to have had actual knowledge of any peculiar usage or custom of his business, and while the law will allow custom and usage to regulate its execution in the reasonable mode we have indicated, it will not permit the defendants, by the force of any such custom or usage, to be bound by a merely fictitious purchase or sale, such for instance as one not *bona fide* and actually made, but pretended to be effected by mere entries upon books and accounts between the plaintiff and his New York agents. We now proceed to consider the questions raised by the exceptions.

1st. It is quite unnecessary to decide in this case whether contracts for the sale of railway shares are within the statute of frauds, and must be proved as required by that statute, because the plaintiff's case does not rest upon the enforcement of any such contract, or upon the count for goods sold and delivered, but upon the fact that he, as their agent, had expended money upon the defendants' order and at their special instance and request. The court was therefore right in permitting the evidence objected to in the first exception to

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go to the jury under the fifth count of the declaration and the defendants have no ground of complaint that their second prayer was confined to the count for goods sold and delivered.

2d. By the second exception a question, not vital to this case, but important as a matter of practice, is presented. The plaintiff proved that, when Hoflin gave the order, one of the defendants, the appellant, was standing immediately behind, near enough to hear when he instructed the stock to be charged to the three defendants. To the admission of this or any other statement of Hoflin to bind them, the defendants objected, upon the ground that proof, constituting him their agent, with authority to bind them, should be first given before such statements were admissible or receivable in evidence. But the court admitted the statement, upon the undertaking and offer of the plaintiff's counsel to follow it up with the requisite proof of such agency. It has been held, in a series of decisions by this court, that evidence relevant and pertinent to the issue is to be admitted without reference to the order of its production; the particular order in which a party may choose to introduce his proof being a matter for his exclusive consideration. Whatever inconvenience this practice may sometimes occasion, it has become too firmly settled to be now disturbed. It is also a settled rule of practice, where evidence which, *per se*, may be irrelevant, but which may become material if followed up by proof of other circumstances and facts, material and competent, with which it may have an important connection, for the court to accept the assurance of counsel that it will be so followed up, and permit it to go to the jury; and if the assurance is not fulfilled, then, on application of the opposing counsel, to direct the jury not to regard it. But this is a rule which, from its liability to abuse, ought not to be enlarged. Experience has convinced us that verdicts are not unfrequently rendered under the influence of irrelevant testimony, admitted upon the unfulfilled assurances of counsel, honestly acting upon information or instructions of their clients that it will be made relevant and material by other testimony to be subsequently produced, notwithstanding the positive instructions of the court, afterward given, that it must not be regarded. Juries are not always composed of men who either can or will divert their thoughts from such proof, and prevent it from having any influence upon their minds. It would, in our judgment, have been a better and safer practice if the courts had, in all cases, required proof of this character to be preceded by that in connection

with which it would become important and material, and we are not disposed to extend the rule beyond what is demanded by express adjudications. We are not aware of any decision that has applied the rule to a case where declarations or acts of agents are offered for the purpose of binding their principals. On the contrary, it is plainly said (*Marshall v. Haney*, 4 Md. 511), that the declarations of an agent are not admissible to bind his principal under any circumstances until the agency is *first* clearly established, and the language of the court, in *Atwell v. Miller*, 11 Md. 359, is to the same effect. It is conceded, of course, that, to entitle the plaintiff to recover in this action, there must be proof that Hoflin was duly authorized to give the order and direct the purchase on the joint account of the defendants. This authority or agency need not be proved by writing; it may be inferred from facts and circumstances, from the permission and acceptance of his services, and subsequent adoption and ratification of his acts, will suffice. But, before his admissions, declarations or acts were admitted to bind the defendants, we think the court should have required the production of some proof tending to show the existence of such agency or authority. The failure, however, to do so is not, in this instance, an error requiring a reversal of the judgment, because we are of opinion there was some evidence adduced tending to show the agency, and fully sustaining the refusal of the court — which is the subject of the fourth exception — to exclude Hoflin's statement, on the ground that no such proof had been given, and the defendants were not, therefore, in fact, prejudiced by the ruling in the second exception.

3d. The third exception was taken, as we understand it, exclusively to the admission of the letters of Dibble & Cambloss, the New York brokers and agents of the plaintiff, to prove the purchase and subsequent sale of the stock. In admitting these as evidence for that purpose, an error, material and fatal to the judgment, was committed. We have already said that, while it was competent for the plaintiff to execute the order and enforce his rights by a purchase and sale of the stock in New York, yet he must establish these facts by legal and competent proof. Without an express agreement to that effect, no usage or custom of trade can be allowed to override the plain rules of evidence, and give to the mere letters of a broker, stating his accounts of purchases and sales, the force and effect of records or judgments importing absolute verity, or impart to the unsworn statements they contain the same efficacy as if made under

Rosenstock v. Tormey.

the sanction of the oaths of the writers, with opportunity of testing their truth and accuracy by a cross-examination. The plaintiff's own letter, written immediately upon receiving the order directing the New York brokers to buy, was admissible to prove that he was prompt to take the necessary steps to execute the order, and gave proper directions to that end; but it would violate cardinal rules and principles of evidence to receive their letters to him to prove, as against the defendants, that the stock was actually purchased and sold in New York. These brokers should have been brought to the stand as witnesses, or their testimony taken under a commission. These letters ought, therefore, to have been excluded, and being excluded, the defendants' fifth prayer would have been correct, inasmuch as the plaintiff himself testified he had no knowledge of the purchase or sale of the stock, apart from these letters.

4th. If the purchase in the mode we have pointed out had been established by competent proof, the plaintiff was not bound to make an actual tender of the stock to the defendants. We have said it was sufficient if he notified them of the fact of the purchase, and had certificates of the stock, or other usual evidences of title thereto, in his own hands, or in those of his New York agents, ready to be delivered or transferred to the defendants upon their tender of payment therefor. Nor was it necessary that the subsequent sale upon default should have been made at a public sale or at a public stock board, and at no other place. A sale, publicly and fairly made, at the stock exchange or a stock board, or at a broker's board, where such stocks are usually sold, would have been good. In *Dalrymple's Case*, 25 Md. 242, it was held that a sale at the broker's board, publicly and fairly made by the pledge of stock, under authority from the pledgor to sell upon default, without further notice, was legal and valid. There was, therefore, no error in the rejection of the defendants' third prayer. Their sixth prayer was also properly rejected, because there was in evidence to the jury the positive testimony of the plaintiff, that he had actually paid to his New York agents the \$12,825 for the stock, which he had directed to be purchased under the defendants' order.

5th. It is not necessary to decide whether, upon the evidence which the court admitted, the instruction granted at the instance of the plaintiff was correct, because, as we have shown, there was a fatal error in admitting in evidence the letters objected to, which constituted the only proof of any purchase or sale of the stock. It is

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apparent this instruction must fall with the rejection of these letters. If, upon another trial which will be awarded, the plaintiff can establish by legal proof this purchase and sale in the mode before stated, in addition to the testimony now decided to have been legitimately admitted, there will be no difficulty in framing an instruction, which will properly present the law of his case, in accordance with the views expressed in this opinion.

Judgment reversed.

IN THE MATTER OF THE INSOLVENT ESTATE OF CONRAD LEIMAN.

(23 Md. 225.)

Claims against insolvent's estate — Statute of limitations — Purchaser with knowledge of prior unrecorded conveyance — Counsel fees.

The statute of limitations does not continue to run against the claims of creditors of an insolvent debtor after his application for the benefit of the insolvent laws, and before an audit and order of the court distributing the insolvent's estate.

The purchaser of property with knowledge in fact of a prior unrecorded conveyance is not a *bona fide* purchaser without notice. Such knowledge is equivalent to registration.

Where a trustee of an insolvent's estate refuses to initiate proceedings to annul a fraudulent conveyance made by the debtor, and the creditors are thereby compelled to institute such proceedings in their own behalf, and the conveyance is set aside, counsel fees are a proper charge against the trust fund.

SETTLEMENT of the insolvent estate of Conrad Leiman. The facts are as follows :

Conrad Leiman conveyed to Harman Schaferman certain leasehold premises on the 30th of September, 1852. Leiman applied for the benefit of the insolvent laws and a discharge May 22, 1854. William Seip was appointed trustee, and the debtor obtained his discharge September 2, 1854. A creditor of Leiman, William O'Brien, commenced proceedings to set aside the conveyance from Leiman to Schaferman, on the 4th of December, 1857; and the proceedings were protracted until September 20, 1862, when it was decided that the deed was fraudulent, and, on appeal, that decision was affirmed. Schaferman had re-conveyed the premises to Leiman on the 6th of

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January, 1857, but the deed was not recorded until June 9, 1860. On the 29th of March, 1860, Schaferman had conveyed a portion of the property, which was conveyed to him by the original deed from Leiman, to Weaver and Voyce, the latter of whom subsequently disposed of his interest to Weaver. May 25, 1861, Conrad Leiman had conveyed, in consideration of a nominal sum, the property which was re-conveyed to him by Schaferman, to his son, G. W. Leiman. The trustee, Seip, died, and on the 29th of April, 1868, Dawson was appointed, who sold the property in question; and the sale was ratified September 2, 1868. The creditors of Leiman, whose claims antedated his application for the benefit of the insolvency laws, were notified to file their claims on or before August 21, 1868. The claims, which are here brought under consideration, are as follows:

Weaver claimed, as assignee of a judgment obtained by Schneider and Von Eiff, on March 25, 1853, and assigned to him in 1868; also as being entitled to the surplus of the property which had been conveyed to him by Schaferman. Filed May 16, 1868.

G. W. Leiman claimed, under the deed from his father, the surplus, after paying legitimate claims and expresses.

Paige claimed, on notes and account, dated 1851 and 1852, \$140.93; filed August 19, 1868.

Lange claimed, as assignee of a judgment obtained in 1852, \$59.05; filed July 27, 1868.

Harmon claimed \$157.64 on account, with interest; filed September 8, 1868.

Classen claimed on judgment for \$152; obtained June 2, 1852; filed August 1, 1868.

Chinn claimed on accounts \$116.48, from 1850, and \$10.70 and \$150, from 1852, with interest; filed August, 1868.

O'Brien claimed as assignee of a judgment \$275; June 9, 1853; also costs in circuit court, \$84.24; cost in court of appeals, \$93.75. (The last two claims of O'Brien were allowed below.)

Eversman claimed as assignee of a judgment for \$375 from January, 1853; also, \$75 paid when he had been security for Leiman; filed March 27, 1869.

McLaughlin, Esq., claimed \$500 for professional services as counsel for O'Brien.

The claims of the creditors were rejected by the court below on the ground that they were barred by the statute of limitations.

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The claims of O'Brien and McLaughlin were allowed, and the surplus was awarded to G. W. Leiman.

There were appeals by the rejected creditors; by G. W. Leiman and Weaver because of the allowance of the claims of O'Brien and McLaughlin, and by Weaver because of the allowance of the surplus to G. W. Leiman.

Albert Ritchie, for Leiman.

George H. Williams, Louis Henninghausen, Patrick McLaughlin, Spottswood, Oregon R. Benson and Thales A. Linthicum, for creditors.

ROBINSON, J. The main question in these appeals is, whether the statute of limitations continues to run against the creditors of an insolvent debtor, after his application, and before an audit and order of the court distributing the insolvent estate. Important as this question is, it comes now before this court for the first time for decision. In the absence, however, of direct authority to guide us, we think there can be but little difficulty in its determination upon principle.

It is unnecessary to cite authorities to support the long-established doctrine that, as between the *cestui que trust* and *the trustee*, in the case of an *express subsisting* trust, length of time constitutes no bar to relief. Such is the *privity* existing between them the possession of the one is the possession of the other, and if the *trustee* fails to perform the trust, his possession is not adverse, but according to his title. Lewis on Trusts and Trustees, 612; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 633.

In regard, however, to *implied or constructive trusts*, arising by operation of law, the rule is different, because it rarely happens that such *trusts* are admitted or recognized by the parties; and, moreover, the facts out of which they spring, necessarily, from their very nature, presuppose an adverse claim of right on the part of the trustee. Hill on Trusts, 264. The remedy, therefore, of the *cestui que trust* in such cases is put upon the same footing of other equitable rights, and although the statute of limitations in terms only embraces *legal actions*, yet, in all cases of concurrent jurisdiction, where a party has a legal and equitable remedy in regard to the same subject-matter, courts of equity obey the law, and give to the

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statute the same effect and operation in the one court as in the other. *Dugan v. Gittings*, 3 Gill, 138; *Hertle v. Schwantze*, 3 Md. 383; *Kane v. Bloodgood*, 7 Johns. Ch. 90. The question, therefore, as to whether the statute operates as a bar in these appeals, must depend upon the nature and character of the trust created by the operation of the insolvent laws of this State, for it is clear, by all the authorities, that if it be an *express* trust, the plea of the statute cannot avail as against the *cestui que trust*.

Now, by the insolvent laws of this State, the debtor, in consideration of his discharge from the payment of his debts, is required to convey and deliver to a trustee, appointed by the court, all of his property, of every kind and description, in trust for the benefit of creditors, being such at the time of application in insolvency, and, for the faithful performance of his trust, the trustee is obliged to give his bond, with approved security. The property, thus being vested in the trustee, is no longer within the reach of process by the creditors, and the insolvent, being discharged from the payment of his debts, is no longer liable to suit, and the trustee being answerable only for a breach of trust, no proceedings can be instituted against him until the ratification of the audit, because, until then, and notice thereof, he is not guilty of a breach of trust. *Williams v. Williams*, 3 Md. 163; *Buckey v. Culler*, 18 id. 418. It is clear, therefore, that the rights of creditors must be worked out through the medium of a trust, the property affected by which, the code provides, shall be distributed according to the principles of equity, and the trustee thereof subject to the same control of the court as trustees appointed by a decree in equity. §§ 10 and 12, article 48 of the Code of Public General Laws.

Here, then, is an express subsisting trust, created by statutory enactment, the *uses, terms* and conditions of which are declared, the property affected by the trust ascertained and defined, and the *cestuis que trust*, namely, the creditors of the insolvent at the time of his application, designated with as much certainty and precision as if they were severally named in the deed of trust. The acts of the trustee in converting the property into a fund for distribution, and in preparing the subject-matter of the trust for the action of the court, are to be considered as the active assertion of the rights of the creditors, the *cestuis que trust* as against the property, and it cannot be that the delay incident to the execution of the trust shall work to their prejudice or injury. And hence, in *Ex parte Ross &*

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Hooper, in the matter of *Coles, a bankrupt*, 2 Glyn. & Jam. 46, the vice-chancellor said, "that after a commission issued, the statute of limitations did not run against a creditor; that the commission was a *trust* for the benefit of all the creditors, and it was a known principle that the statute did not run against a trust." This decree was, upon appeal, affirmed by the lord chancellor, who held that, "whatever may be the technical objection, the effect of the commission is clearly to vest the property in the assignees for the benefit of the creditors; they are, therefore, in fact, trustees; and it is an admitted rule, that, unless debts are already barred by the statute of limitations when the trust is created, they are not afterward affected by lapse of time."

Also, in *Minot v. Thatcher*, 7 Metc. 348, it was held, under the insolvent laws of Massachusetts, that the statute did not run against the creditors of the insolvent after the publication of the messenger. Justice DEWEY, in delivering the opinion of the court, said: "By force and effect of the appointment of a messenger, and the publication thereof conformably to the statute, the property of the insolvent debtor is sequestered for the benefit of all the then existing creditors. After such a publication, a suit by a creditor would be of no avail, as the property is all transferred to the assignee, and the body of the debtor is to be discharged from arrest on execution. The debts presented for allowance against the insolvent are to be considered with reference to their validity at the date of the publication by the messenger, and unless barred at that time they must be allowed." Any other rule would be obviously unjust. Take the case of a creditor, whose debt will not be barred for at least a year; he knows that, under the statute, he has until within the last day of the year within which to bring suit; but, before that time, the debtor becomes insolvent, and his right of action is gone. Now, if the principle contended for by the appellee be correct, and more than a year should elapse before the insolvent estate is ready for an audit, the insolvent, or his assignee, could interpose the plea of the statute, and thus defeat the claims of creditors. In this view we do not concur, but are of opinion that after the application in insolvency, and during the execution of the trust, the statute does not operate against the then existing creditors.

This construction certainly accords with the plainest principles of justice in these appeals. Here was attempt, on the part of the insolvent debtor, to cheat and defraud his creditors. Having fraudulently

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conveyed his property for that purpose, he applies for the benefit of the insolvent laws, and declares, in the schedule annexed to his petition, he has no property liable for his debts. After his final discharge, Schaferman, the *fraudulent grantee*, re-conveys the property to *Leiman, the insolvent debtor*, and he in his turn, in consideration of *one dime*, conveys it to *his son*. The trustee in insolvency refuses, upon the application of the creditors, to file a bill in equity assailing the fraudulent conveyance, and the creditors are obliged themselves to institute proceedings. After a long and protracted litigation, extending from the court below to the court of last resort, the conveyance is condemned as being fraudulent, and the property directed to be sold; and, when the proceeds of sale are brought into court for the purpose of being distributed among the creditors, the plea of limitations is interposed by the *assignee* of the *insolvent debtor* on the one hand, and by the *assignee* of the *fraudulent grantee, Schaferman*, on the other. If the plea of the statute could avail under such circumstances — if the delay incident to the execution of the insolvent trust, and occasioned by the fraudulent acts of the very parties under which these assignees now claim, could operate to defeat the payment of honest creditors, it would indeed be a just reproach to the administration of the law. While it is true that a court of equity extends a reluctant hand of relief in case of stale demands, where a party has slept upon his rights, and where time and long acquiescence have obscured the true nature and character of the trust, it will never visit upon a party the consequences of a delay for which he is in nowise responsible, nor hold him guilty of *laches* in not prosecuting his demands when there was no process by which they could be enforced.

The case is widely different from a creditor's bill, because, there the creditor has no one to represent him until his claim is filed. Moreover, the death of the debtor does not suspend the right of action on the part of the creditor, he may still sue the administrator or executor, and if there should be an insufficiency of the personal estate, he may file his bill for the sale of the real estate.

In *Strike's Case*, 1 Bland, 57, the proceeding was to set aside certain fraudulent conveyances, and for a sale of the property for the benefit of creditors, and although in the disposition of some of the questions which arose, the chancellor likened it to a case of insolvency, the distinct question in regard to the statute of limitations

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raised by these appeals did not arise, and cannot be said to have been directly passed upon. No such question was decided by this court in *Strike v. McDonald & Son*, 2 H. & G. 191.

We are of opinion, therefore, that the court erred in rejecting the claims of Herman Classen, Henry Chinn, John H. Lange, Washington A. Page, Samuel Harman and Frederick Eversman, and the order in each one of these appeals will be reversed. We have not considered the objections to the authentication of these claims, because from the opinion of the court they do not appear to have been made at the hearing, and must be considered as having been waived. The claim of O'Brien, assignee, being allowed, the order in that case will be affirmed.

We are also of opinion that the claim of Patrick McLaughlin, for professional services, was properly allowed. If the trustee in insolvency had employed counsel to institute proceedings assailing the fraudulent deed of the insolvent, the costs, and all expenses incident thereto, would have been a proper charge against the trust fund, and because he refused to discharge his duty, thereby compelling the creditors to take proceedings, is no reason why they should be held personally responsible. The order in that case will be affirmed.

The only remaining question is the title to the surplus, should there be any after the payment of creditors; and this must depend upon whether Weaver, assignee of Schaferman, had *knowledge in fact* of the *prior* unrecorded conveyance of Schaferman to Leiman, for if he had, then such knowledge is equivalent to registration. *Price and Bevans v. McDonald et al.*, 1 Md. 403; *Winchester et al. v. Balt. & Susq. R. R. Co.*, 4 id. 231; *Johns v. Scott*, 5 id. 81. It is unnecessary to examine here in detail the evidence upon this point, and it will be sufficient to say that we are of opinion that Weaver, at the time of the assignment from Schaferman to him, had full knowledge of the prior assignment to Leiman. He is not, therefore, a *bona fide* purchaser without notice. We are of opinion, therefore, that George W. Leiman, assignee of Conrad Leiman, is entitled to the surplus, if any, after the payment of the claims of creditors.

The case will be remanded, with directions to the auditor to state an account, in conformity with the views herein expressed.

 Haile v. Peirce.

HAILE et al., appellants, v. PEIRCE.

(33 Md. 327.)

Promissory note — Liability of agent — Parol evidence.

A promissory note read as follows: "Four months after date, we, the president and directors of the Dulaney's Valley and Sweet Air Turnpike Company, of Baltimore county, promise to pay to William F. Peirce, or order, one thousand dollars with interest, for value received;" and was signed by C. T. H., "president," J. N. H. and J. G. D., "directors," and E. R. S., "secretary." In an action to recover on the note, *held*, that parol evidence was admissible to show that the drawers of the note signed it as agents of the company and not as individuals, and that the note was accepted as the note of the company.

ACTION on a promissory note. The facts are stated in the opinion of the court.

Lewis H. Wheeler and *R. R. Boarman*, for the appellants, argued that parol evidence was admissible to prove that the note was that of the corporation, citing *Wyman v. Gray*, 7 H. and J. 409; *Johnson v. Smith*, 21 Conn. 627; *White v. Skinner*, 13 Johns. 307; *Hovey v. Magill*, 2 Conn. 680; *Hodgson v. Dexter*, 1 Cranch, 105; *Collins v. Johnson*, 16 Ga. 458; *Babcock v. Beman*, 1 Kern. 200; *Byles on Bills* (4th Am. ed.), 27 (1); *Brockway v. Allen et al.*, 17 Wend. 40; *Story on Agency* (6th ed.), 154, a.

Arthur Machen, for the appellee, argued that the face of the note showed the defendants to be liable, citing *Sumwalt v. Ridgely*, 20 Md. 107; *Wyman v. Gray*, 7 H. and J. 409; *Lennard v. Robinson*, 5 El. and Black. 125; *Hills v. Bannister*, 8 Cow. 31; *Byles on Bills*, 55.

That the note was not within the authority of the corporation, citing *Grant on Corp.* 276; 80 Law Lib. 287; *Byles on Bills*, 33; *Penn. Steam Nav. Co. v. Dandridge*, 8 S. and J. 218; *Abbott v. Bal. & Rapp. S. P. Co.*, 1 Md. Ch. Dec. 542; *Maryland Hospital v. Foreman*, 29 Md. 524.

That the contract should be construed to have some effect, and if the company are not bound the individuals must be, citing *Mare v. Charles*, 5 El. and Black. 978 (85 E. C. L.); *Wordes v. Dennett*, 9 N.

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H. 55; *Rew, Exr. of Newton, v. Pettel et al.*, 1 Ad. and El. 196; *Higgins v. Senior*, 8 M. and W. 844; *Nash v. Towne*, 5 Wal. 689.

STEWART, J. The action in this case was brought to recover on the promissory note of the following description, to wit:

“\$1,000. BALTIMORE COUNTY, *August 8, 1865.*

“Four months after date we, the president and directors of the Dulaney’s Valley and Sweet Air Turnpike Company of Baltimore county, promise to pay to William F. Peirce, or order, one thousand dollars with interest, for value received.

“CHARLES T. HAILE, *President.*

“J. N. HENDERSON, *Director.*

“JOSEPH G. DANCE.

“EDWARD R. SPARKS, *Sec’y.*”

The first and second counts of the *narr.* were for money lent and paid; the third, for the overdue and unpaid promissory note; the fourth, like the third, with the addition that the appellants promised as president and directors of the company.

The appellants filed seven pleas: First, that they were never indebted; second, that they did not promise, as alleged; third, fourth, fifth and sixth were special pleas and demurred to, but not material to be particularly described here; the seventh, that the promissory note sued on is not the note of the appellants.

The appellants admit their signatures to the note, and its due execution, but insist that they signed the same as agents for the company, and not in their individual capacity, for a debt due by the company; that the appellee accepted it as such, with full knowledge that such was its character and purpose. They therefore maintain that it is not their individual note, and that they are not bound individually for its payment.

The material issue between the parties is, as to the liability of the appellants to pay the note in question. Owing to the obscure manner in which instruments have been drawn, and the uncertainty of the terms of description where contracts have been made or promissory notes given by agents, there has been difficulty in determining whether the principal or the agent, or both, are liable, not because of any difference in the principles of construction governing in such cases, but from their application to particular cases; and no uniform

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and consistent rule can be extracted from the authorities upon the subject.

In the court of appeals of our own State, in the case of *Sumwalt v. Ridgely*, 20 Md. 114, the court, referring to cases to be determined alone from the terms of the instrument, state: "The established rule seems to be, that an agent, in making a promise for a principal, is liable on the promise, unless it be expressed in terms which show that it was made for and on behalf of the principal; and where an agent makes a promissory note to a third person, in terms sufficient to bind himself as principal, the mere addition of the word "agent," or other description of his office or capacity, to his signature, does not change or vary the legal effect of the promise itself;" and reference is made to Story on Prom. Notes, §§ 67, 68 and 69, and Byles on Bills, 27, n. 1.

If it can be collected upon the whole instrument, that the "true object and intent of it were to bind the principal and not to bind the agent, courts of justice will adopt that construction of it, however informally it may be expressed." Story on Prom. Notes, § 69.

But sometimes the agent may attach to his signature the character in which he signs the instrument, without any correspondent, or other description, in the body of the note—or he may, in the body of the instrument, disclose the name of his principal and sign his own individual name, without any additional description whatever—or he may sign his own name, without apt terms to charge himself, and in the body of the note use doubtful expressions to describe the principal, leaving the precise meaning of the instrument, to be gathered from the terms on its face, so ambiguous or obscure as to render its interpretation, *per se*, too difficult and uncertain for just and sound construction.

When the note is of this last description, that is, where its language or terms are so unintelligible as to admit of no rational interpretation of the meaning, or are not sufficiently decisive of the intention of the parties, but, on the contrary, are equivocal and uncertain, extraneous proof, as between the original parties, may be admitted to show the true character of the instrument, and what party—the principal, or the agent, or both—is liable.

Where individuals subscribe their proper names to a promissory note, *prima facie*, they are personally liable, though they add a description of the character in which the note is given, but such presumption of liability may be rebutted, as between the original

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parties, by proof that the note was in fact given by the makers, as agents, with the payee's knowledge. Byles on Bills 27, n. 1.

The terms of the note, now under consideration, upon its face being ambiguous and uncertain, as to the fact, whether the appellants did sign it in their individual or official capacity, and relevant extraneous proof might aid in the solution of the question, it was competent for either party to show, by any pertinent, extraneous evidence, on what account the note was given, and whether on the credit of the company or upon the individual responsibility of the appellants, as the joint makers thereof, for the purpose of proving or tending to prove the true character and purport of the note. This could not vary or contradict the instrument, but might be explanatory of its meaning, where otherwise it would be unintelligible. While the appellants, on the one side, might prove that the note was signed by them, as agents of and for the company, by the extraneous evidence, on the other, the appellee might show that, although the appellants were acting in behalf of the company, he refused to give credit to the company, and the appellants did in fact substitute their own individual responsibility for that of the company.

Evidence on both sides, relevant and proper, in reference to the true and precise character and purport of the note, was admissible; and the court below was in error in excluding the testimony proposed by the appellants, appropriate to this inquiry.

The ruling of the court below, permitting the note to be given in evidence to the jury (4th exception), is affirmed; but in excluding the offered testimony on the part of the appellants in 5th, 6th, 7th, 8th, 9th, 10th and 11th exceptions, is reversed.

Under this disposition of the case, the other exceptions (1st and 2d) in regard to the demurrer, and 3d exception to the manner of drawing the jury, and 12th and 13th exceptions, granting the appellees' prayer and rejecting those of the appellants, become immaterial, and unnecessary to be specially determined in this appeal.

Judgment reversed.

Wonder v. The Baltimore and Ohio Railroad Company.

WONDER, appellant, v. THE BALTIMORE AND OHIO RAILROAD
COMPANY.

(23 Md. 411.)

Master and servant—Liability of railway company for injuries sustained by employees.

An employee of a railway company cannot recover for an injury sustained by reason of an alleged defective brake, unless it is shown that the company was negligent, either in providing the machinery which caused the injury, or in selecting the mechanics whose duty it is to keep it in good order.

A railway company is not bound to change its machinery in order to apply every new invention or supposed improvement in appliances; and an employee who consents to operate the machinery already provided by the company, knowing its defects, does so at his own risk.

ACTION by an employee against his employer for injuries sustained in his service. The facts appear in the opinion of the court.

Wm. Shepard Bryan, for appellant, argued, that if better machinery had been provided by the railway company the accident could not have happened, and, therefore, the company was liable, citing *Hard v. Vermont and Canada R. R. Co.*, 32 Vt. 479; *O'Connell v. Balt. and Ohio R. R. Co.*, 20 Md. 213; *Bartonshill Co. v. Reid*, 3 McQueen, 266 (House of Lords); *Bryden v. Stewart*, 2 id. 30; *Marshall v. Stewart*, 33 Eng. Law and Eq. 1.

F. C. Latrobe and James A. Buchanan, for appellees.

ALVEY, J. This is an action by an employee against his employer, to recover for an injury received while engaged in the work for which he was employed, by reason of defective machinery that he was required to operate.

The plaintiff was a brakeman in the employ of the defendant, on one of its burden trains, and, while engaged in his work, he received the injury complained of, which was occasioned by an alleged defect in the brake to one of the cars that he was using in the regular course of his duty. The supposed defect consisted in the use of a hook instead of an eye-bolt on the brake, and in having the point of the hook turned the wrong way. In attempting to use the brake, in consequence of the defect, the plaintiff was suddenly thrown from

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the car to the track, and was caught between the brake-shaft and the trucks of the car and dragged a considerable distance, and seriously injured. He alleges that there was negligence on the part of the defendant in regard to the use of this defective brake, and that he is entitled to recover from the company the damages sustained by him as the consequence of such negligence.

It is now settled that there is no contract obligation imposed upon the master, from the mere relation that he bears to the servant, to provide machinery of any particular character or description, to be operated by the latter, nor is there any implied undertaking on the part of the former, resulting from the mere relation as employer, that the machinery shall be kept free from defects, such as may expose the servant to danger. The servant is a free agent to select the employment into which he enters, and, in contracting for the wages that he is to receive, must be supposed to take into account the risks to which the employment may expose him; and among those risks are the defects and accidents of the machinery, and the negligence and want of caution of fellow-servants in the common employment. To hold the master liable to the servant for all the injuries resulting to the latter from defects in machinery or materials upon which he may be employed, or from the negligence of fellow-servants, engaged in the common employment, would go far to impede, if not to make it impossible to carry on, many of the great works of the country. All that can be required of the master, and for the neglect of which he is responsible to the servant, is, that he shall use due and reasonable diligence in providing safe and sound machinery, and in the selection of fellow-servants of competent skill and prudence, so as to make it reasonably probable that injury will not occur in the exercise of the employment. He is required, also, as far as he can by reasonable care, to avoid exposing his servant to extraordinary risks, which could not have been reasonably anticipated at the time of the contract of service, though, as to such extraordinary risks, it would seem the master does not guarantee against them. *Riley v. Baxendale*, 6 Hurl. & N. 446.

From these general principles it follows that the master is not liable to his servant for any injury occasioned by a defect of machinery furnished to the latter to operate, unless he was negligent in providing such machinery, or, if he knew of the defect, in omitting to warn the servant of its existence. And, where the defect producing the injury complained of was the consequence of the incompe-

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tency or neglect of a fellow-servant, or where the origin of the defect did not appear, it has been held that the master was not liable to his servant, it not appearing that he had been guilty of negligence, either in selecting the fellow-servant or in providing the machinery in which the defect occurred. *Tarrant v. Webb*, 18 C. B. 797; *Ormond v. Holland*, EL. B. & EL. 102; *Wigmore v. Jay*, 5 Exch. 354; *Brown v. Accrington Cotton Company*, 3 Hurl. & N. 511.

Who is a fellow-servant, within the meaning of the rule, has been a question of some diversity of decision, though the decided weight of authority is to the effect that all who serve the same master, work under the same control, deriving authority and compensation from the same source, and are engaged in the same general business, though it may be in different grades and departments of it, are fellow-servants, each taking the risk of the other's negligence.

Or, to state the rule more generally, in the language of a decision that has been approved by this court, "all who are engaged in accomplishing the ultimate purpose in view — that is, the running of the road — must be regarded as engaged in the same general business, within the meaning of the rule." *Hard v. Vermont and Canada R. R. Co.*, 32 Vt. 473; *O'Connell v. Balt. & Ohio R. R. Co.*, 20 Md. 212. It follows, therefore, that the brakeman on the train is in the same common employment with the mechanics in the shops to repair and keep in order the machinery, and with the inspector of the machinery and rolling stock of the road, and the superintendent of the movement of trains. *Farwell v. Boston and Worcester R. Co.*, 4 Metc. 49; *Hayes v. Western R. Co.*, 3 Cush. 270; *Sherman v. Rochester and Syracuse R. Co.*, 17 N. Y. 153; *Ryan v. Cumberland Valley R. Co.*, 23 Penn. St. 382; *Feltham v. England*, Law Rep. 2 Q. B. 33; *Searle v. Lindsay*, 11 C. B. (N. S.) 429. If, therefore, the defect in the brake that caused the injury in the present instance existed by reason of the neglect or want of care on the part of such employees of the defendant, the latter cannot be held liable, unless there has been negligence in the selection of those servants, and the *onus* of proof of such negligence is on the plaintiff. 20 Md. 212; 25 id. 462; 27 id. 589.

The case of *Searle v. Lindsay*, before referred to, well illustrates this. There the plaintiff was employed by the defendants as their third engineer on board their steam vessel. While turning a winch, one of the handles came off, in consequence of the want of a nut or pin to secure it, and the plaintiff was thereby seriously injured. He

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was, with others, at work at the winch by the orders of the chief engineer, who knew that the instrument was out of order, but was, nevertheless, a competent person for the position he occupied. There was no evidence of personal negligence on the part of the defendants, and it was held that the chief engineer and the plaintiff were fellow-servants, and that, as the defect existed by reason of the negligence of the chief engineer, whose duty it was to see that the machinery was kept in proper condition, the plaintiff could not recover. And, in the concurring opinion of Mr. Justice WILLIAMS in that case, the law is briefly but clearly stated that governs cases like the present. He said: "I think there was no foundation for the argument that Simpson, the chief engineer of the vessel, and the plaintiff stood in any other relation toward each other than that of ordinary fellow-servants. Then, applying the rule of law which is now firmly established, the common employer is not liable to either for an injury sustained through the negligence of the other. In order to take this case out of the ordinary rule, it was contended that here there was negligence on the part of the employers themselves. In order to make that out, there must be reasonable evidence to show that they were to blame, either in respect to their not having provided proper machinery and appliances or not having retained competent workmen. I do not find any evidence at all of any default in either of these particulars. If the winch was out of order, it was owing to Simpson's negligence. There was no evidence nor any suggestion that Simpson was not a perfectly competent engineer." And such was the view of all the judges.

In the case before us, the question, depending upon a diversity of opinion, as to whether the eye-bolt or the hook is the better mode of fastening the brake, is immaterial, as both seem to be approved appliances, tested by trial and experience; and if it were conceded that the eye-bolt has superior merits, it by no means follows that the defendant was bound to discard the hook that had been used for a long time, and on so many of its cars, without accident. A master is not bound to change his machinery, in order to apply every new invention or supposed improvement in appliances, and he may even have in use a machine, or an appliance for its operation, shown to be less safe than another in general use, without being liable to his servants for the consequences of the use of it. If the servant thinks proper to operate such machine it is at his own risk; and all

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that he can require is, that he shall not be deceived as to the degree of danger that he incurs. *Dynen v. Leach*, 26 L. J. Exch. 221; 1 Redf. on Railw. 521, note.

As to the defective attachment of the hook, it was shown to have been the duty of the employees, Fairbanks, Buckingham and Day, to see that the cars and their appliances were kept in proper and safe repair. Whatever negligence, therefore, may have existed in regard to the arrangement of the brake, and of the defective attachment of the hook thereto, was the negligence of those employees, the fellow-servants of the plaintiff; and there is an entire absence of evidence to show that there was the least negligence on the part of the defendant in the selection and employment of those servants; but, on the contrary, there is the most abundant evidence that such servants were of sufficient competency and skill; nor is there the slightest evidence in the case, that any superintendent or other agent, having control and general direction of the employees, and for whose negligent conduct the defendant would be responsible to the plaintiff, ever had knowledge of the defective condition of the brake before the occurrence of the injury. The proof wholly failing in these important particulars, the court below could not have done otherwise than instruct against the plaintiff. The essential proof of the gravamen of the action was wanting, and of course the plaintiff could not recover. The several prayers of the defendant were unobjectionable, and the court was therefore right in granting them. And as by the granting of the defendant's prayers the case was taken from the jury, the plaintiff's prayer, which was rejected, became unimportant.

For these reasons the judgment will be affirmed.

Judgment affirmed.

NOTE.—The following are well-settled rules touching the liability of the master to the servant for injuries sustained by the latter in the course of his employment:

1. A master is not responsible to those in his employ for injuries resulting from negligence, carelessness or misconduct of a fellow-servant engaged in the same general business. *Farwell v. The Boston and Worcester R. R. Co.*, 4 Met. 49; *Browne v. Maxwell*, 6 Hill, 593; *Coon v. Syracuse and Utica R. R.*, 5 N. Y. 492; *Sherman v. Rochester and Syracuse R. R.*, 17 Id. 153; *Russell v. Hudson River R. R. Co.*, Id. 134; *Boldt v. The New York Central R. R. Co.*, 18 Id. 422; *Hayes v. The Western R. R. Co.*, 8 Cush. 270; *Albro v. The Agawam Canal Co.*, 6 Cush. 75; *Ray v. Boston and Worcester R. R. Co.*, 9 Cush. 113; *Gillahan v. The Stony Brook R. R. Co.*, 10 Id. 228; *Hutchinson v. The York, etc., R. R. Co.*, 5 Exch. 343; *Warner v. The Erie Railway Co.*, 39 N. Y. 463.

2. The rule exempting the master is the same, although the grades of the servants or employees are different, and the person injured is inferior in rank and subject to the direction and general control of him by whose act the injury is caused. *Hayes v*

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The Western R. R. Co., supra; Albro v. The Agawam Canal Co., supra; Wyman v. Jay, 5 Exch. 352; Brickner v. The New York Central Railroad Co., 2 Lans. 506.

3. Neither is it necessary, in order to bring a case within the general rule of exemption, that the servants, the one that suffers and the one that causes the injury, should be at the time engaged in the same operation or particular work. It is enough that they are in the employment of the same master, engaged in the same common enterprise, both employed to perform duties and services tending to accomplish the same general purpose, as in maintaining and operating a railroad, operating a factory, working a mine or erecting a building. *Boldt v. New York Central R. R. Co., 18 N. Y. 432; Warner v. The Erie Railway Co., 39 Id. 468; Coon v. Syracuse, etc., R. R. Co., 5 Id. 492; Farwell v. Boston and Worcester R. R. Co., 4 Metc. 49; Priestly v. Fowler, 8 Mees. & Wels. 1, and the other cases cited above.*

4. The master is liable to his servant for any injury happening to him from the misconduct or personal negligence of the master; and this negligence may consist in the employment of unfit and incompetent servants and agents, or in the furnishing for the work to be done, or for the use of the servant, machinery and other implements and facilities improper and unsafe for the purposes to which they are to be applied. *Priestly v. Fowler, 8 Mees. & Wels. 1; Hayden v. Smithville Manufacturing Co., 29 Conn. 548; Roberts v. Smith, 2 H. & M. 213; Williams v. Clough, 3 Id. 257; Griffith v. Giddow, 3 Hurlst. & N. 648; Wyman v. Jay, 5 Exch. 343; Owens v. Holland, Ellis, Black & Ell. 103; Keegan v. W. R. R. Co., 8 N. Y. 175; Patterson v. Wallace, 28 L. & E. 43; Marshall v. Stewart, 33 Id. 1.*

5. If the servant sustaining an injury through the unskillfulness or insufficiency in number or otherwise of his fellow laborers, or through defects in the machinery or conveniences furnished by his employer, has the same knowledge or means of knowledge of the unskillfulness or deficiency referred to as his employer, he cannot sustain an action for the injury, but will be held to have assumed all the risks of the employment, under the existing facts. *Wright v. New York Central R. R. Co., 26 N. Y. 562; Priestly v. Fowler, 8 M. & W. 1; Frazer v. Penn. R. R. Co., 38 Penn. St. 104; Mad River, etc., R. R. Co., v. Barber, 5 Ohio St. 541, 562; Griffith v. Giddow, 3 Hurlst. & N. 648; Russell v. Laconia Manufacturing Co., 48 Me. 113; Senior v. Ward, 1 El. & El. 385; Skip v. Eastern Counties Railway Co., 24 L. & Eq. 396; Loonam v. Brockway, 28 How. 472.*

In *Hard v. The Vermont Central Railroad Co., 32 Vt. 473*, it was held that "although it is the duty of a railroad corporation to exercise all reasonable care in procuring sound machinery, and faithful and competent employees, and although they are liable to their servants for the neglect of this duty, yet, after having performed it, they are not liable to a servant for injuries occasioned by the neglect of any of his co-servants engaged in the same general business, even though the negligent servant be superior in grade to the one injured."

BACON, J., in commenting on this case, in *Warner v. Erie Railway Co., 39 N. Y. 473*, says: "It is said, and it may be conceded, that this case is in advance of any decision yet made, where the principle is involved, but if so, it is, in my opinion, a sound and judicious advance. It does not exonerate the directors of a railroad corporation from liability for personal negligence, nor discharge them from the obligation to perform their duty, if notice or knowledge of defects or insufficiencies is brought home to them, and the injury results to one of their servants from a failure to remedy a defect through which the injury occurs. It holds them to the highest measure of responsibility for the proper construction of the road, its arrangements and equipments, and the selection of competent and skillful subordinates to supervise, inspect and repair, and control and regulate its operation; but, having faithfully performed these duties, it relieves them from the extreme rigor of a rule which would practically make them insurers of the absolute safety of, and indemnities for, every injury which an employee in their service might suffer from the act or omission of his fellow-servant."

It is not necessary that the master should know that the servants employed or materials furnished are incapable and unsafe, but it is sufficient that he would have known if he had exercised reasonable care and diligence. *Noyes v. Smith, 23 Vt. 63*, and cases cited. And some of them hold that the master is liable if he either knew or ought to have known the dangerous character of the machinery and appliances fur-

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nished the servant. "He is chargeable with knowledge of the probable consequences of the acts he directs or of which he has cognizance." *Ryan v. Fowler*, 24 N. Y. 413; *Wright v. New York Central R. R. Co.*, 25 id. 564; *Snow v. Housatonic R. R. Co.*, 2 Allen, 441. — RHP.

**THE WASHINGTON FIRE INSURANCE COMPANY OF BALTIMORE,
AND THE ATLANTIC FIRE AND MARINE INSURANCE COMPANY,
appellants, v. KELLY.**

(23 Md. 421.)

Fire insurance—Construction of policy—Interest of the insured—Assignment—Subrogation.

A policy of insurance against fire was issued upon the conditions, *that* if the interest of the insured in the property was a leasehold interest, or other interest not absolute, the company should be so informed at the time of contracting the insurance, or the policy would be void; and *that* a sale or conveyance of the property, or an assignment of any interest in the policy without the consent of the company, would render the policy void. The insured, at the time the insurance was negotiated, was the owner of an equity of redemption only, with possession of the property insured; but no mention of that fact was made.

Subsequently, the insured entered into a contract for the sale of the property under which he received a part of the purchase-money, but continued in possession and held insurance policies for the benefit of the vendee. A total loss, by fire, of the property afterward occurred; and, in an action on the policy by the assignee of the insured, *held*:

1. That the interest of the insured as mortgagor was absolute, within the meaning of the policy, and no explanation of that interest was required before insurance.
2. That an executory contract for the sale of the premises did not violate the prohibition in the policy against sale or assignment.
3. That the insurance company, on payment of the loss, could not be subrogated to the rights of the insured, *pro tanto*, under the contract of sale.

ACTION on a policy of insurance against fire.

The policy was issued by the Washington Fire Insurance Company of Baltimore to Beekman and Reeder, insuring them for one year from the 14th of May, 1867, against loss by fire, to the amount of \$2,500, on the building well known as "Barnum's Museum," in

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New York. There was also another policy, for the same amount, issued on the same property about the same time by the Atlantic Insurance Company. The two policies are sued upon in this action. The policy of the Washington company contained the following provisions.

“If the said property shall be sold or conveyed, or if this policy shall be assigned, without consent of the company obtained in writing hereon * * * then, and in every such case, this policy shall be null and void.”

“3. Policies of insurance subscribed by this company shall not be assignable without the consent of the company, expressed by indorsement thereon; in case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of the company in virtue of such policy shall thenceforth cease; and the company reserves to itself the right to elect, either to consent to the transfer or to return a ratable proportion of the premium and cancel the policy.”

“2. * * * If the interest in property to be insured be a leasehold interest, or other interest not absolute, it must be so represented to the company and expressed in the policy in writing, otherwise the insurance shall be void.”

The policy of the Atlantic company was not so explicit on these points, but the last part of the fourth condition was as follows:

“4. * * * Nor can any policy or interest therein be assigned but by consent of the company, expressed by an indorsement thereon.”

It appears that, at the time of the negotiation for the insurance, Beekman and Reeder were owners only of an equity of redemption in the property, there being mortgages on the property to the amount of \$350,000. On the 11th of February, 1868, the owners entered into a contract for the sale of the property to Charles W. Budd; \$10,000 purchase-money was paid down, and the deed of conveyance was to be delivered April 1, 1868. The possession of Beekman and Reeder was continued, and all policies of insurance were left in their hands for the benefit of the vendee until the contract should be executed. The property was destroyed by fire on the 2d of March, 1868. On the 5th of March, 1868, a deed was executed and delivered by Beekman and Reeder, dated the 11th of February, 1868, to Kelly, the appellee. On the 1st of June an absolute assignment of all insurance policies was made to the appellee.

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On the trial the plaintiff claimed, first, that Beekman and Reeder had an insurable interest; and second, that there had been no such sale or conveyance as to vitiate the policy or forfeit the rights of the insured.

The defendants claimed,

1. On the part of the Washington company, that the plaintiff cannot recover, because no representation was made to the company of the fact that Beekman and Reeder were owners only of an equity of redemption in the property.

2. On the part of both companies, that, if the policies did attach, the plaintiff can recover only a *pro rata* amount of the loss, considering the fact that Beekman and Reeder received \$10,000 purchase-money on the contract of sale.

3. On the part of both companies, that the defendants, on payment of loss, if they were so compelled, should be subrogated to the rights of Beekman and Reeder, under the contract of sale.

4. On the part of both companies, to the same effect as No. 3.

5, 6, 7. Are unimportant, as having been more or less embodied in the claims already given.

The plaintiff's claims were allowed, the defendants' disallowed, and judgment was rendered in favor of plaintiff, and defendants appealed.

Thomas H. Hall, Jr., and S. Teackle Wallis, for appellants, argued that the policy never attached because the interest of Beekman and Reeder was not *absolute*, and cited *Bouvier's Law Dic. "Absolute;" New York Life Ins. Co. v. Flack*, 3 Md. 353; *National Ins. Co. v. Crane*, 16 id. 286; *Mutual Ins. Co. v. Deale*, 17 id. 38, 49; *Edmunds v. Mutual Safety Co.*, 1 Allen, 307, 311; *Reynolds v. The State Mutual Ins. Co.*, 2 Grant (Penn.), 327-329; *Columbia Ins. Co. v. Lawrence*, 2 Pet. 25; 10 id. 507; *Carpenter v. Provid. Ins. Co.*, 16 id. 505; *Catron v. Tenn. Ins. Co.*, 6. Humph. 189. That the contract of sale was in violation of the provisions of the policy of the Washington company, and cited *Balt. Fire Ins. Co. v. Loney*, 20 Md. 36; *Ayres v. Hart. Ins. Co.*, 17 Iowa, 185, 186; 21 id. 196-198; *Finley v. Lycoming Ins. Co.*, 30 Penn. 310; *Hart. Fire Ins. Co. v. Ross*, 23 Ind. 181; *Edmunds v. Mutual Safety Co.*, 1 Allen, 311; *Davenport v. New England Mutual Co.*, 2 Gray, 338; *Keeler v. Niagara Ins. Co.*, 19 Wis. 537; 2 Burrill's Law Dic. "Sale;" 88 How. 400. That, if payment should be compelled, the company

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were entitled to subrogation to the rights of Beekman and Reeder, under the contract of sale, and cited *Pentz v. Receiver of the Aetna Fire Ins. Co.*, 9 Paige, 969; *Carpenter v. Provid. Ins. Co.*, 16 Pet. 501; *Aetna Fire Ins. Co. v. Tyler*, 16 Wend. 397; *Ins. Co. v. Woodruff*, 2 Dutch. 554, 555; *Hart et al. v. Western R. R. Corporation*, 13 Met. 105, 108; *Smith v. Ins. Co.*, 17 Penn. 260; *Kernochan v. N. Y. Bowery Fire Ins. Co.*, 5 Duer, 1, and 17 N. Y. 428; *Parsons on Marine Ins.*, 227.

I. Nevett Steele, for appellee, argued that the insured, Beekman and Reeder, had an insurable interest in the property, and cited 2 American Leading Cases, 550; *Allen v. Insurance Co.*, 2 Md. 111; *Franklin Ins. Co. v. Coates & Glenn*, 14 id. 297. That the contract of sale, being merely executory, did not vitiate the insurance, and cited:

That the interest of Beekman and Reeder, at the time of the insurance, was "absolute," within the meaning of the policy, and cited *Hough v. City Fire Ins. Co.*, 29 Conn. 10, 19, 20; *Gaylord v. Lamar Ins. Co.*, 40 Mo. 13; *David v. Hart. Fire Ins. Co.* and *Toughurt v. Conway Fire Ins. Co.*, Digest of Decisions on Fire Ins. 584, 587; *Swift v. Manuf's Ins. Co.*, 18 Vt. 305; *Buffum v. Bowditch Mutual Fire Ins. Co.*, 10 Cush. 543; *Wilson v. Conway Fire Ins. Co.*, 4 R. I. 156; *Hope Mutual Ins. Co. v. Brolasky*, 35 Penn. 282; 1 Bosw. 507, and others.

STEWART, J. The insurance companies in these cases, which have been brought up in the same record and argued together, insist that they are not responsible for the loss occasioned by the fire, because, as they allege, certain stipulations and conditions of the respective policies have not been observed on the part of the insured, although they concede that all other provisions have been complied with to entitle the insured to recover.

Under these circumstances, the determination of the questions involved, depends upon the construction of the clause in the policy of the Washington Fire Insurance Company, and the conditions of the policy, and the conditions in the policy of the Atlantic Fire and Marine Insurance Company. The clause is to the following effect:

"If the property shall be sold or conveyed, or if this policy shall be assigned, without the consent of the company obtained in writing thereon, then this policy shall be null and void."

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The conditions of the same policy are of the following character:

"If the interest in property to be insured be a '*leasehold*' interest, or other interest *not absolute*, it must be so represented to the company, and expressed in the policy in writing, otherwise the insurance shall be void."

"Policies of insurance subscribed by the company shall not be assignable without the consent of the company, expressed by indorsement made thereon; in case of assignment without such consent, whether of the whole policy or of any interest in it, the liability of the company, in virtue of such policy, shall thereafter cease."

The Atlantic Fire and Marine Insurance Company has this condition, to wit:

"Every policy of insurance made by this company shall be sealed with its seal, signed by the president, and attested by the secretary; and the person for whose interest the insurance is made must be declared and named therein; nor can any policy or interest therein be assigned but by the consent of the company, expressed by an indorsement made thereon."

The policy of insurance in this case, with all of its provisions and conditions, is the written contract between the insurer and the insured, and, as much of the argument of the case was directed to a discussion of the rule to be applied in the interpretation of such a contract, we may premise that the same principles of construction govern the contract of insurance, as other written contracts.

In its interpretation, as in all other contracts, the intention of the contracting parties is to be regarded, and where that can be ascertained it must govern and control their rights under it, if not in conflict with the law. *Maryland Insurance Co. v. Bossiere*, 9 G. & J. 155.

The provision in the policy of the Washington Fire Insurance Company against the sale or conveyance of the property insured, and against the assignment of the policy without the consent of the insurers, as it imposes a restriction upon the right of disposing of property, should be construed, as any other contract with like provision, with strictness; and nothing less than the absolute sale or conveyance of the property, with all the usual legal ingredients to constitute the transaction as such, or similar complete assignment of the policy, can be considered as sufficient to avoid the pol-

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icy on that account. *Lazarus v. Commonwealth Ins. Co.*, 5 Pick. 76-82.

There is no doubt that an insurance against fire without an interest in the subject-matter insured is a *wagering* contract, which the law does not sanction; and it is, therefore, necessary that the insured should have an interest in the property insured, not only at the time of the insurance, but when the loss by fire occurs. If the insured sell the property, and transfer all his interest therein, or assign all interest in the policy, before the loss happens, he cannot recover by the principle of the common law. This provision in the policy is but the incorporation of this legal principle therein.

The insurance of buildings against loss by fire is a contract with the owner (or any person having an interest in their preservation), to indemnify against any loss sustained by him by fire; and if the insured has sold, conveyed or assigned all his interest in the same before the fire, he can, in fact, sustain no damage, and the insurers are under no obligation to pay any one. Angell on Insurance, 230, 231.

According to the tenor and effect of the language in this proviso, it is not any change or modification in the title to the property that will avoid the policy, or any reduction of the interest from an absolute to a qualified interest, because the reduced interest is insurable.

The proviso is restrictive of the sale or conveyance of the property insured, and where the sale or conveyance is relied upon by the insurers, to prevent the recovery for any loss by fire, the sale or conveyance must be made out full and complete. To constitute a sale, within the meaning and terms of the proviso, the right to the property sold and to the possession thereof must pass from the vendor to the vendee. The mere contract for the sale or conveyance, not divesting the title of the vendor and vesting the same in the vendee, is not a breach of the proviso.

A contract to convey the buildings insured at a future day, on payment of the purchase-money, and between the time of contract and its consummation, they are destroyed by fire, the vendor being in possession, it is not such an alienation as vacates the policy. Angell on Insurance, § 206.

The contract of the 11th of February, 1868, between Beekman and Reeder and Charles W. Budd, was an executory contract to sell and convey the property insured, and the lots upon which the build-

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ings stood, and certainly was not such sale or conveyance as forfeited the rights of the insured under the provisions of the policy. There is no doubt, that the insured, as the vendors of the property, before the actual conveyance thereof, held an insurable interest therein. 3 Kent's Comm. 489, n. 1.

Besides the clause in this policy against its assignment, it is one of the conditions annexed to the same, that it shall not be assignable, nor any interest in it. Fire policies have never been regarded as transferable, without the consent of the company. Angell on Insurance, § 11. But where there is no restriction, the policy was assignable in equity, like any other *choss in action*; though, to render the assignment of any value to the assignee, an interest in the subject-matter of the insurance must be assigned also, for the assignment only covers such interest as the insured had at the time of the assignment. This restriction applies only to transfers before a loss happens. 3 Kent's Comm., § 496.

The assignment after the loss stands on the same footing as the assignment of a debt or right to receive a sum of money actually due. Angell on Insurance, § 222.

The agreement as to an assignment of the policies, conceding there was such an agreement between the parties, as understood by Mr. Clark, and that such agreement by *parol* could operate where there was a written contract between the parties, can occupy no higher ground than the agreement for the sale of the property. It did not amount to an assignment of the policy, or the assignment of any interest therein, and was simply a contract to assign; but the insured, in fact, held the policy and made no assignment thereof. They held the possession of the property as well as the policy of insurance, notwithstanding the contract to sell and convey the same.

The condition in the policy of the Atlantic Fire and Marine Insurance Company, restrictive of any assignment of that policy or any interest therein, is of like purport and to the same effect as the clause and condition in the policy of the Washington Fire Insurance Company, and the same construction is therefore applicable to that policy. In the condition requiring the interest in property to be insured, if a *leasehold* or other interest *not absolute*, to be so represented to the company and expressed in the policy, the term *leasehold ex vi termini* imports a qualified interest, the other interest, *not absolute*, although not so particularly described

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by the general term used, must be understood as referring to some similarly qualified interest, as the "leasehold."

The language employed in the condition recognizes the distinction between *leasehold* or other qualified interests, as contradistinguished from those that are absolute or unlimited. The "leasehold" is carved out of the fee simple, which remains vested in another, who holds the absolute estate, and so of any other inferior interest less than the absolute. The term "not absolute" cannot mean a fee-simple interest in the property.

The appellants, while they concede that the title of the insured was, in all other respects, perfect, yet insist that the interest of the insured in the property was *not absolute*, as contemplated by the terms of the condition, because of the existence of the mortgages thereon. The "leasehold," from its well-known signification and its immediate connection with the other interest *not absolute*, necessarily is used as descriptive of the meaning and extent of the other. It is an interest less than the fee-simple, so is an estate for life, for a term of years or at will.

By a lease one grants an interest less than his own, and the lease is properly a conveyance of lands, tenements or hereditaments, made for life, for years or at will, but always for a less estate than the lessor has in the premises. When the owner in fee grants a lease he still retains his absolute interest. 2 Blacks. Comm., 267.

To inferior and limited interests the general language of the condition is applicable, and the mortgages upon the property must have the effect to reduce the estate of the mortgagor to some such qualified interest to bring it within the operation of the condition.

The estate in lands, tenements and hereditaments is the interest the tenant has in them, and to ascertain precisely the character of that interest, the estate must be considered with regard to the quantity of interest—the time at which that quantity of interest is to be enjoyed, and the number of the tenants; the quantity of the interest is to be measured by its duration and extent; thus, either his right of possession is to subsist for an uncertain period, during his own life or that of another person, to determine at his own decease, or to remain to his descendants after him; or it is circumscribed within a certain number of years, months or days; or it is infinite and unlimited, being vested in him and his representatives forever.

The owner in fee-simple holds the lands, etc., to him and his heirs

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forever, *generally* and *absolutely*, and he has *absolutum et directum dominium*, and therefore is said to be seized thereof in *dominico suo*, in his own *demesna*.

Estates or interests may be held as a security for the payment of a debt by mortgage or dead pledge, *mortuum vadium*, 2 Black. Com., ch. 7, 104, 107, 157, and the mortgage upon it does not affect either the *quantity* or character of the estate, but simply holds it to secure the debt. Mortgages are now universally regarded, in courts of equity, as mere securities for the payment of money, chattel interests or *choses in action*; the debt being considered the principal, and the mortgage as accessory and appurtenant thereto, and before foreclosure belongs to the executor, and though the technical fee may descend to the heir, he takes it in trust for the personal representative.

The mortgagor is the substantial owner of the property, though the legal estate is in the mortgagee, and he can transfer or vest his interest at his own pleasure, so long as the right of redemption exists, and the interest of the mortgagor is also liable to attachment and execution.

The mortgagee has an interest in the subject-matter of the mortgage not *absolute*, but *commensurate* with the object contemplated to be attained by it, as a security for the payment of a debt due from the mortgagor to the mortgagee, and his claim does not vest in him the estate in the lands mortgaged, but follows the nature of the debt, and as a chattel interest belongs to his representatives in case of his death.

The equity of redemption in the mortgagor is not only a subsisting estate and interest in the land in the hands of the heirs, devisees, assignees and representatives of the mortgagor, but of any other persons who have acquired any interest in the lands, by operation of law or otherwise, in privity of title.

Courts of equity, though a mortgage be forfeited, and the estate absolutely vested in the mortgagee, at common law, yet they will allow the mortgagor, at any reasonable time, to redeem his estate. So long as the estate can be shown to have been treated as a pledge, there is a recognition of the mortgagor's title. Nor will they permit a conveyance made to secure a debt, to operate for any other purpose than to secure the debt; the conveyance will be considered as merely holding the property as pledged, and no agreement in a mortgage will be suffered to make the property irredeemable. *Ford v. Philpot*,

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5 H. & J. 312; *Evans v. Merriken*, 8 G. & J. 39; *Chase v. Lockerman*, 11 id. 185; *G. C. Coal Co. v. Detmold*, 1 Md. 237; *Allen v. Mutual Ins. Co.*, 2 id. 111; *Timons and Wife v. Harrison*, 19 id. 296; Code, art. 64, § 20; Story's Eq. Juris., §§ 1015–1023; 4 Kent's Com. 156–166; 2 Black. Com. 159, and n. 8.

Notwithstanding the mortgages upon the property, the mortgagors held the equity of redemption, the real and beneficial estate, equivalent to the fee-simple at law, descendible by inheritance, devisable by will, and alienable by deed; as any other absolute estate of inheritance. To all intents and purposes they held the *absolute* interest in the property insured; the mortgages were but temporary and incidental incumbrances, and could not operate to render their interest a *limited* one.

Upon no sound principle of construction, relating to the nature and qualities of estates, can the interests of the mortgagors, as holders of the equitable fee-simple, be divested or reduced to a qualified or inferior estate.

They were not within the terms of the condition, and were not required to communicate to the insurers the fact that the property was subject to the mortgages. If the insurers designed to require a disclosure of all incumbrances upon property insured, they have not used apt and sufficient language to accomplish that object.

To give to the terms of the condition the force claimed by the insurers, would be to substitute another and different contract for the parties, and such construction can find no warrant or authority in the terms of the condition, as they stand in the policy. According to these views, it follows that there was no error below, in granting the appellee's prayers, and refusing the first, fifth, sixth and seventh prayers of the appellants.

The agreement of the 11th of February, 1868, between Beekman and Reeder, and Budd, was an executory contract between the parties, and under that contract the insured were not divested of their interest in the property, and were entitled to be indemnified by the insurers, according to the contracts of insurance, for the loss they sustained by the fire.

To constitute an insurable interest, it is not necessary that the insured shall, in all cases, have the absolute and unqualified interest in the property insured — a trustee, mortgagee, a reversioner, a factor, an agent, with the custody of goods to be sold on commission, may insure. 3 Marshall on Ins. 64, ch. 2, p. 789.

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The mortgagor and mortgagee may each insure his own interest—the first insures the property, which he may do for its full value, as the owner thereof; the latter, to the extent of his debt, and no further. The first, notwithstanding the incumbrance on his property, is entitled to recover the full amount of his loss, within the limits of the insurance; the latter, if the premises are destroyed by fire before the extinguishment of the mortgage, has the right to be paid his debt by the insurers, if not more than the insurance, and the underwriters, in such case, become entitled to the debt, and can recover the same from the mortgagor, and are subrogated to the rights of the mortgagee. 2 Marshall on Ins. 64, ch. 2, p. 789.

The payment of the insurance does not discharge the mortgagor from the debt, but the insurers become his creditors, and have the right to an assignment of the debt from the mortgagee. There is no privity, in law or fact, between the mortgagor and the mortgagee, in the contract of insurance, and the mortgagor can take no advantage of the policy of the mortgagee for his debt, for he has no interest whatever therein, but is bound to pay the debt to the insurers, where they become his substituted creditors. Angell on Ins., 59.

In *King v. State Ins. Co.*, 7 Cush. 1, referred to in 3 Kent's Com. 489, n. 6, it was held (SHAW, C. J., giving the opinion), that the insurers could not insist upon an assignment of the mortgagee's interest, as a preliminary condition to the payment of a loss, and that it was not inequitable to allow the mortgagee to recover, both from the underwriters and the mortgagor.

But the contract of insurance is strictly a contract of indemnity, and the mortgagee is not entitled to recover from the insurers the value of the property lost, and his whole debt, besides, from the mortgagor. When his debt is paid, and he is indemnified, it seems more in consonance with the just principle of indemnity, that the insurers should have the right to be substituted in his place and allowed to collect the debt from the mortgagor.

The policy of insurance, from its legal effect, according to judicial decision, must receive such reasonable construction as imports with its true character as a contract of indemnity. Angell on Ins. 103, note 1, referring to an opinion of GIBSON, C. J.

The effect of the destruction of the buildings by fire, upon the contract between Beekman and Reeder and Budd, could not operate to change the contract between the insurers and the insured. The

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fact of the insured having contracted to sell the property, and received a part of the purchase-money, ought not to deprive them of their indemnity, unless it had been so stipulated by appropriate terms. If the insured had made an absolute sale of part of the property insured, that would have avoided the policy *pro tanto* — Angell on Ins. 196 — but as that was only a contract to sell the property, the insured are entitled to full indemnity, otherwise, the contract of insurance is not gratified. We think the second prayer of the appellants was properly refused. The third and fourth prayers of the appellants were properly refused.

The insured is entitled to be indemnified for the loss of the buildings by fire, to the extent of his insurance, and there is no reason to reduce the amount because a contract had been made for their sale.

The rule of subrogation is thus stated in 2 Phillips on Ins. 282: “Where the insurable interest consists of a debt due to the assured, the assured is bound to assign to the underwriters the debt or his insurable interest, whatever it may be, in case of his being paid a total loss.” This equitable principle cannot be applied here, where no debt has been insured, paid by the insurers, and to be assigned, and the insured have not been paid to the full limit of their loss.

The whole of the insurance, according to the admitted facts, amounted to some \$60,000, and the buildings destroyed were worth \$100,000. The fact that the buildings, with the lots upon which they stood, were under contract to be sold at the time of the fire, does not deprive the insurers of any of their rights, or increase their responsibility, nor does it confer upon the insured any additional advantage growing out of their contract with the insurers.

The insurers cannot be benefited by a subrogation to the rights of the insured without affecting the claim of the insured to be fully indemnified for their loss. The equitable principle of subrogation cannot be applied where it conflicts with that indemnity to which the insured is entitled under the contract of insurance.

The destruction of the buildings by the fire is an absolute loss, which the insurers are obliged to meet, according to the terms of the policies of insurance, applied to the admitted facts, and there is no just ground upon which they can be relieved by any subrogation to the rights of the insured under the circumstances of this case.

Judgment affirmed in both cases.

The Mayor, etc., of Annapolis v. Harwood.

THE MAYOR, ETC., OF ANNAPOLIS, appellant, v. HARWOOD.

(33 Md. 471.)

Evidence — contradicting published acts of legislature.

In an action under an act of the legislature, which act had been signed by the governor, certified under the great seal, and published as required by the State constitution, evidence was offered to show that the act had been changed by a mistake of the engrossing clerk. *Held*, inadmissible.

THE facts are stated in the opinion.

S. T. McCullough & A. B. Haynor, for appellant.

William Harwood, for appellees.

MAULSBY, J. In this case an injunction was obtained by the appellees to restrain the appellants from selling, through their collector, the property of the appellees for payment of a proportion of "special tax," for paving two hundred and forty-five feet of North-East street, in the city of Annapolis. The power is claimed by the appellants under the act of 1867, ch. 240. That act, so far as pertains to this case, in the printed volume of laws, is in the following words: "To impose and appropriate fines, penalties and forfeitures for the breach of their by-laws and ordinances, and to levy and collect taxes, not exceeding one per centum, on all the property of the citizens of said city; to pass ordinances for the prevention and extinguishment of fires, for paving and keeping in repair the streets, lanes and alleys in said city, and for extending and widening the same to any particular part or district of the city, for paving the streets, lanes and alleys therein, or for sinking wells, making pumps, water-pipes, fountains, hydrants and water-plugs, which may appear for the benefit of each particular part or district." The act, as printed, is correctly taken from the copy which was recorded in the office of the court of appeals, in conformity with the provisions of the constitution of 1864, which was in operation when it was passed. The appellants insist that the act, as recorded and printed, did not contain all the provisions which it contained when it was, in fact, passed by the two houses, and they produce a copy certified by the chief clerks of the senate and house of delegates respectively, to be

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a true copy of the act as passed, with contents different from those above quoted, and they offer to prove that the difference was occasioned by mistake of the clerk in engrossing the same, after its final passage, preliminary to its examination by the committee on engrossed bills, and to the affixing of the great seal, signature by the governor and recording. The act, as printed, the appellants admit, was duly examined by the committee, sealed, signed and recorded, and the question is whether it is competent, by extrinsic evidence, to prove the contents of an act of assembly to be different from those set out in the copy, which has been attested in all the forms prescribed by the constitution. The act of 1867 was to take effect from its passage.

Although this question did not arise in the court below, yet, as it might be raised in the course of further proceedings in the cause, and has been fully argued by the counsel of the appellants, we will consider and determine it.

The 29th section of article 3, of the constitution of 1864, provides that "every bill, when passed by the general assembly, and sealed with the great seal, shall be presented to the governor, who shall sign the same in the presence of the presiding officers and chief clerks of the senate and house of delegates. Every law shall be recorded in the office of the court of appeals, and in due time be printed, published and certified under the great seal to the several courts, in the same manner as has been heretofore usual in this State. The object of these careful provisions was to guard against controversy in respect to the *contents* of laws. To attest the verity of the contents of a law all these solemnities are invoked. Not only must it be sealed with the great seal, and signed by the governor, but it must be so signed in the presence of those officers of the two houses, who are best qualified to know whether the contents of the paper, being signed, are the identical contents of the law which passed their respective houses. Then it is to be recorded, and from the record office is to be again certified under the great seal, printed and published. We cannot perceive on what principle the court could be justified in going behind evidence so fully presented by the constitution, and inquiring, on extrinsic proof, into the verity of the contents of an act of assembly so attested.

The claim of the appellants against the appellees was made on the 11th of March, 1869, and, on the 17th of the same month, the bill was filed. When the controversy originated, therefore, the act of

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1867 had passed through all the forms of attestation prescribed by the constitution, and it is manifest, from the answer of the appellants, that they claimed the power in virtue of the act as printed in the statute book. There is in the answer no averment of error or mistake in respect to the contents of the act. We are informed by the counsel of the appellants, that the suggestion of error was first made in the argument in the court below. But however the question may have arisen, or however it might be raised in the course of further proceedings, the result must be the same. We think that the court cannot go behind the proof prescribed by the constitution in inquiring into the contents of statutes. A similar question arose in the case of *Fouke v. Fleming & Douglass*, 13 Md. 392, where the court said: "Seeing that the engrossed bill and the published copy of the law corresponded, we do not feel authorized to assume they are erroneous, and decide the law to be according to the evidence of the proceedings of the legislature, as furnished by the journals of the two houses." While it is not said in terms that no evidence would be admissible to prove the contents of an act of assembly to be different from the engrossed and printed statute, yet as the journals would be the next best evidence, a refusal to consider them would indicate the opinion of the court to be that no extrinsic evidence could be admitted. In the case of *Dowling v. Smith*, 9 Md. 242, in which the judges delivered separate opinions, LE GRAND, C. J., and ECCLESTON and MASON, JJ., concurring in the judgment, though not taking the same grounds. Judge MASON said that the act in question, in that case, became perfected law from its final engrossment. It was passed by the house on the 7th of March, by the senate on the 8th, and was engrossed on the 10th. It was argued that the engrossment of an act of assembly is the copying, after all amendments, preliminary to their reading and final passage, but this view is not sustained by a reference to the dates of final passage and engrossment of the act in question in the case of *Smith and Dowling*. By the practice of our general assembly there is a final engrossment, after the passage of a bill, made for examination by the committee on engrossed bills, sealing with the great seal, etc. To that final engrossment the court referred in *Fouke v. Fleming & Douglass*.

In the cases referred to by the appellants' counsel in 1 Denio, 9, 14 Ill. 297, and 19 id. 324, the question was, whether the acts of the legislature under review in those cases had been, in fact, passed in conformity with the provisions of the State constitutions. In

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inquiring into that *fact*, the courts held that it was proper to go behind the evidence of the statute books. Here the question is one of evidence to prove *contents*. (The rest of the opinion is local in character.)

GUERAND, appellant, v. DANDELET.

(83 Md. 561.)

Restraint of trade—Breach of covenant—Injunction.

G. leased a dyeing and scouring establishment, in the city of Baltimore, for a term of years, to F. & D., partners, and at the same time sold them the good-will of the business, and covenanted never to enter into competition, directly or indirectly, with the lessees, in Baltimore, in the trade or profession of dyeing and scouring. The partnership between F. & D. was subsequently dissolved; D. became sole owner of the partnership interest; the lease expired, and D. removed next door and established himself in the regular business of dyeing and scouring. G. then made an arrangement with his son, by which the trade was re-established at the old stand, under the name of the son, the father being the real proprietor. On an application for an injunction, *held*, that the covenant was valid; that the dissolution of the partnership between F. and D. did not release the covenantor from his obligation to D.; and that the re-establishment of the business by G., under the name of his son, was in violation of the covenant, and could be restrained by injunction.

INJUNCTION. The facts are stated in the opinion of the court.

Argument before BARTOL, C. J.; STEWART, BRENT, MAULSBY, ALVEY and ROBINSON, JJ.

Joseph Henisler and *William Pinkney White*, for appellant, argued that the contract was in restraint of trade and against public policy; that, if binding on the father, it was not on the son; that it was good, if at all, only during the partnership.

Arthur G. Brown and *George William Brown*, for appellee, argued that limited contracts in restraint of trade, like the present, were valid, citing *Barley v. Davis*, 2 G. & J. 382; *McClurg's Appeal*, 58 Penn. 51; *Catt v. Tourle*, 4 Ch. App. Cases, 659; *Mitchell*

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v. *Reynolds*, 1 P. Wms. 181; *Davis v. Mason*, 5 T. R. 118; *Hayward v. Young*, 2 Chitty, 407; *Bunn v. Guy*, 4 East. 190; also that this was a proper case for an injunction, citing Am. Law Reg., Feb. 1870; *Butler v. Burleson*, 16 Vt. 176; *Beard v. Dennis*, 6 Ind. 200; *Palmer v. Graham*, 1 Pars. 46; *Harrison v. Grardner*, 2 Madd. Oh. 198, and others.

ALVEY, J. This is an appeal from an order granting an interlocutory injunction to restrain the appellant and his father, Francis Guerand, from carrying on a dyeing and scouring establishment, at No. 124 North Howard street, in the city of Baltimore, and from advertising the same in any newspaper, or by card, circular or otherwise.

In determining upon the propriety of the order appealed from, we are confined, on this appeal, exclusively to the bill and the exhibits filed therewith; for if the answer, which is required to be filed as a condition precedent to the right of appeal, could be taken into consideration, we should be reviewing the order by the light of other facts than those presented to the judge below and upon which he acted. This would not be at all consistent with the exercise of mere appellate jurisdiction, to which this court is confined.

The appellee, the complainant below, by his bill and exhibits, presented, we think, a clear case for the injunction that was granted. By the lease of the 17th of October, 1859, Francis Guerand, the father of the appellant, let to Jean Feuillan and the appellee his house and lot, No. 124 North Howard street, theretofore used as a dwelling, store, and dyeing and scouring establishment, for the term of ten years, at an annual rent of \$1,000; and in this lease we find incorporated an agreement by which the lessor sells to the lessees the custom, good-will, name and utensils then in, upon and about the leased premises, theretofore known as "Guerand's Dyeing and Scouring Establishment," together with the right to use the same name and style as theretofore, and carry on the business of dyeing and scouring, for the sum of \$3,000, payable in installments; and Guerand, the lessor, covenanted that, on the payment of the purchase-money for the custom, good-will, name and utensils sold, he would not, *at any time thereafter*, "exercise or conduct, in the city of Baltimore, the trade or profession of a dyer or scourer, *nor directly or indirectly* compete with the aforesaid lessees and vendees for the good-will and custom sold as aforesaid."

The purchase-money for the custom, good-will, name and utensils has all been paid, and the term of the lease has expired, and there has been no renewal of it. The copartnership between the complainant and Feuillan, entered into at the date of the lease, has been dissolved, and upon such dissolution, Feuillan, in pursuance of the terms of the articles of copartnership, sold and assigned to the complainant all his interest in the partnership and its property and effects. The complainant, shortly before the expiration of the lease, applied for its renewal to him, but the amount of rent asked being largely increased over the former rent, he declined to accept a renewal on the terms proposed to him ; and, on having to surrender the premises at No. 124 North Howard street, he rented the premises next door thereto, and established himself, by a considerable outlay of money, in his regular business of dyer and scourer, where he has continued to carry on such business to the present time. And the ground of complaint now is, that since his removal from No. 124 North Howard street, Guerand has recently opened, or caused and permitted to be opened there, a dyeing and scouring establishment, with conspicuous signs and advertisements of the business, intended to recall former customers ; such signs and advertisements, containing the name of E. F. Guerand, the son, as proprietor ; but it is alleged that the use of such name is a mere cover and blind, adopted with the intent to conceal the interest of the father in the establishment ; that the capital employed in the business, as well as the property occupied by the establishment, belongs to Francis Guerand, and not to the son in whose name the business is apparently conducted. It is also alleged that the competition thus brought into existence is seriously injurious to the business of the complainant, and that it is in derogation of the contract with Francis Guerand of the 17th of October, 1859.

By the contract the restriction on the exercise of the trade in the city of Baltimore is plain and unequivocal. Guerand covenanted that he would not, *at any time thereafter*, be engaged in the particular business, nor directly or indirectly compete for the good-will and custom sold. The restriction as to locality is limited, but as to time it is without any limit whatever ; and it has been contended by the appellant that the whole covenant is void, because its observance would operate to the prejudice of trade and industry.

As a general rule, it is true, a contract, whether under seal or otherwise, in unlimited restraint of trade, or of any particular voca-

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tion, is absolutely void, as being contrary to public policy, as well as oppressive in its operation upon individual industry. This has been the law from an early period in the history of English jurisprudence, as is abundantly shown in the elaborate judgment of Lord MACCLESFIELD, in the leading case of *Mitchel v. Reynolds*, 1 P. Wms. 181. But while this is the general rule, the same leading case just referred to fully establishes the principle that contracts only in partial restraint of any particular trade or employment, if founded upon a sufficient consideration, are valid and enforceable.

The restraint, however, to be lawful, must be confined within reasonable limits. "Where it is larger and wider than the protection of the party with whom the contract is made can possibly require," said the court in *Hitchcock v. Coker*, 6 Ad. & El. 454, "such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void." If the restraint, therefore, be general and not confined to any particular locality, the shortness of the time for which it is imposed will not make it good. *Ward v. Byrne*, 5 M. & W. 548. But if it be reasonable as to locality, the fact that it is indefinite as to its duration will not affect its validity. Add. on Contrs. 100. "Contracts restraining the exercise of a trade or profession, in a particular locality," says the author just cited, "are good and valid when there is a fair and reasonable ground for the restriction, as in the case of the sale of the good-will of a trade or business carried on in a particular locality, where the vendor covenants or agrees not to carry on the same business in the same place, in opposition to the purchaser;" and he cites for this passage of his work the cases of *Prugnell v. Gosse*, Aleyn, 67; *Broad v. Jollyffe*, Cro. Jac. 596; and 2 Rolle, 201.

It is objected to the present covenant that it is too comprehensive in its restriction; that, as it restrains the covenantor indefinitely as to time from exercising his trade at any place within the city of Baltimore, it is therefore void. But we perceive nothing in it to render it obnoxious to the objection. The authorities sustain restrictions more comprehensive than that imposed by this covenant; as in the case of *Green v. Price*, 13 M. & W. 695, where a perfumer sold to his copartner his share of the business of the firm, and covenanted not to carry on the same business in the cities of London and Westminster, or within six hundred miles from those cities. The court of exchequer held the covenant to be valid as to the restraint of the practice in London and Westminster, but void

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as to the residue; and that judgment was affirmed in the exchequer chamber, after full argument. 16 M. & W. 346. And in the case of *Atkyns v. Kinnier*, 4 Exch. 776, there was a covenant by a surgeon not to practice or reside at any time within two and a half miles of the plaintiff's residence in London, and such covenant was held to be valid, and it was declared to be no objection to it that it imposed the restriction during the life of the covenantor, "for that," said PARKE, B., "enables the good-will of the business to become the subject of purchase and sale." See also the cases of *Davis v. Mason*, 5 T. R. 118; *Bunn v. Guy*, 4 East, 190; *Mallan v. May*, 11 M. & W. 665, where the restrictions were larger than in the present case, and yet the contracts were adjudged good.

This, it must be borne in mind, is the case of a contract for the sale of the custom and good-will, in connection with the utensils of an establishment, for a valuable consideration; and if such restriction as is attempted to be imposed by it be not allowed, the subject of the contract would never be saleable, as it could at any moment be rendered valueless by the competition of the vendor. The general rule against covenants in restraint of trade is founded doubtless upon the policy of the law which favors trade and enterprise, and the reason of the exception engrafted upon that rule is, as was observed by MAULE, J., in *Rannie v. Irvine*, 7 Man. & Gr. 969, "that the exception is in furtherance of the rule itself. If it were held that a party selling the good-will of a business could not restrain himself from using for his own profit that which he had agreed to sell, that would operate as a restraint of a very injurious kind." And, in the case just referred to, the assignor of a lease and the good-will of the business of a baker agreeing that he would not, during the term assigned, solicit the custom of, or knowingly supply bread or flour to, any of the customers then dealing at the premises, without the consent of the assignee, it was held not to be an unreasonable restraint of trade.

Whether the consideration for the restraint is adequate or not is a question that the court will not inquire into. It is sufficient that the contract shows on its face a legal and valuable consideration; but whether adequate or inadequate to the restraint imposed, must be determined by the parties themselves, upon their own view of all the circumstances attending the particular transaction. If it were otherwise, it would be the court, and not the parties,

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that would make the contract. All that the court is required to do, in passing upon the validity of the covenant, is to determine whether the restraint is reasonable and consistent with law, and whether there be a legal consideration to support it. This is now the established doctrine, as decided in the cases of *Hitchcock v. Coker*, 6 Ad. & El. 439; *Archer v. March*, id. 966; *Leighton v. Wales*, 3 M. & W. 551; *Pilkington v. Scott*, 15 id. 657; *Sainter v. Fergusson*, 7 C. B. 716. And here there certainly appears a legal consideration for the covenant.

It was urged in argument that the restriction should not, by construction, be extended beyond the period of the partnership between the parties to whom the lease was made and the custom and goodwill were sold; and as the partnership terminated with the expiration of the term of the lease, the complainant, individually, has no right to the relief sought in this case. In that, however, we do not agree. The vendor bound himself, for the period of his life, to refrain from all competition for the good-will and custom sold. And the circumstance that the parties to whom the sale was made have dissolved their partnership does not release the covenantor from his obligation to observe his covenant. The complainant has become entitled to the benefit of the covenant by virtue of the articles of co-partnership between himself and Feuillan, and the subsequent assignment of the latter. Good-will "is an interest which may be valued between the parties, and may, therefore, be assigned, with the premises and the rest of the effects, to the remaining partner, as an accompaniment of the ordinary good-will of the establishment." Story on Part., § 99. And in the case of *Hitchcock v. Coker*, 6 Ad. & El. 439, it was said, by Chief Justice TINDALL, speaking for the court; "The good-will of a trade is a subject of value and price. It may be sold, bequeathed, or become assets in the hands of the personal representative of a trader. And, if the restriction as to time is to be held illegal, if extended beyond the period of the party by himself carrying on the trade, the value of such good-will, considered in those various points of view, is altogether destroyed." There is no reason, therefore, for holding the restriction to extend only to the time that the vendees continued their joint interest in the covenant.

The covenant being valid, the next question is, does the fact that the business has been re-established or resumed in the name of the son avoid a breach of the covenant of the father? We think not.

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The allegation of the bill is, that the name of the son is used as a mere cover and blind to conceal the interest of the father. If this be so, as we are bound to assume on this appeal, the case is unquestionable. The father's covenant is that he will not, directly or indirectly, compete for the good-will and custom sold to the complainant and Feuillan. This restrains him from the use of any means whatever whereby the value of the thing sold, and for which he has received his price, may be in any manner impaired or lessened. He can neither compete himself, nor employ or combine with others to do it. What he cannot do directly, he cannot do indirectly. And that is what was decided in *Davis v. Barney*, 2 Gill. & Johns. 382. There the party selling out his coaches and teams on a certain road obligated himself to withdraw all his pretensions to any part of the particular route, and pledged himself not to be concerned, directly or indirectly, in any line of stages in opposition to the vendees. And the court, in construing the contract, and defining the extent of the restriction imposed, held, that the defendant could not only not become interested in any opposition, but that he could not, in any manner, aid or become instrumental in setting up or carrying on an opposition line of stages; and that, without such construction, the word "indirect," employed in the contract, would have no meaning or effect whatever.

But it is contended, that, if there be a breach of the covenant, the remedy at law is adequate, and, therefore, a court of equity should not interfere. To this proposition, however, we do not accede, as the authorities fully maintain the right and duty of a court of equity to restrain, by injunction, the violation of contracts of the character of the one before us. *Harrison v. Gardner*, 2 Madd. 198; *Williams v. Williams*, 2 Swanst. 253; *Whittaker v. Howe*, 3 Beav. 383; *Catt v. Tourle*, 4 Ch. App. Cases 659. We shall, therefore, affirm the order of the court below granting the injunction.

Order affirmed.

Allender's Lessee v. Sussan.

ALLENDER'S LESSEE, appellant, v. SUSSAN.

(33 Md. 11.)

Contingent devisees — Limitations.

A will contained a provision by which certain leasehold property was devised to S., and, in the event of her death, "without leaving lawful issue or descendants," to W. *Held*, that the limitation over to W. was not void for remoteness; and that the words "dying without issue," in devises of estates less than freehold, signify "a dying without issue living at the death of the first taken."

ACTION of ejectment to obtain possession of certain leasehold property in Baltimore. The plaintiff was the administrator of Walter Price, a contingent devisee under a will made by William Price. The defendant was a tenant under an assignee of Sarah John Price, who was also a devisee under the said will and first taker of the premises in controversy. The will and the main facts in the case are set forth in the opinion of the court. It appeared that Sarah died without leaving issue. At the trial a verdict was rendered in favor of defendant, and the plaintiff appealed from a judgment thereon.

Arthur W. Machen, for appellant, argued the distinction between chattels real and freehold estates, and claimed that a provision similar to the one in controversy was valid in a devise of chattels real. *Biscoe v. Biscoe*, 6 G. & J. 236; *Usilton v. Usilton*, 3 Md. Ch. Dec 36; 2 Jarman on Wills, 473.

John H. Ing, for appellee.

MILLER, J. The property in dispute appears to be leasehold, and the prayers on either side raise the question of the construction of a clause in the will of William Price, executed in 1828, and admitted to probate the 15th of October, 1831, under which it is assumed the title is derived. By this will the testator devised to several of his grandchildren certain houses and lots in the city of Baltimore, among which, that in dispute is alleged to be embraced in the following clause: "And to my granddaughter, Sarah John Price, her heirs, executors, administrators and assigns, my lot of ground on

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Alice Anne street, with the three story brick house thereon (including basement), adjoining that on the same street above devised to my grandson, William Price. But in case of the decease of all or either of my grandchildren abovenamed, without *leaving* lawful issue or descendants of the same, then I give and devise the property so bequeathed to him, her or them so dying, unto my said son, Walter Price, his heirs, executors, administrators and assigns forever." Sarah John Price died several years since, without ever having had children, and never having been married. The plaintiff is the administrator of Walter Price, and his prayer places his right to recover upon the ground that the devise over to his intestate is good, leaving it to the jury to find that the defendant derives his title from and claims under Sarah John Price, and that the latter derived her title from the will of her grandfather as above stated. The defendant's prayer, which was granted, denies the plaintiff's right to recover upon the evidence of title he had submitted, because the devise over to Walter Price is too remote.

No doubt could exist of the correctness of the construction placed upon this will by the court below if the subject of the devise were a freehold estate. The authorities on this point are too numerous and clear to leave room even for argument. There is, however, a distinction, subtle it may be, but too well settled now to be overturned, between an executory limitation of personal property upon a dying 'without *leaving* issue,' (the words of the present will), and the same limitation of real estate. This distinction, the leading authority for which is *Forth v. Chapman*, 1 P. Wms. 663, runs through all the decisions, and applies even where real and personal estates are comprised in the same gift. *Biscoe v. Biscoe*, 6 G. & J. 236; *Usilton v. Usilton*, 3 Md. Ch. Dec. 36; *Budd v. Posey*, 22 Md. 48; *Woodland and wife v. Wallis*, 6 id. 151; and *Wallis v. Woodland and wife et al.*, 32 id. 101. In most if not all the Maryland cases in which this distinction has been taken and followed, the subject of the limitation has been money or personal chattels. But, in *Forth v. Chapman*, there was a devise of both freehold and leasehold estates to two nephews, and if either "should depart this life and *leave* no issue of their respective bodies," then over, and the question arose whether the limitation over the leasehold premises was void as too remote. The court was of opinion and decreed that the devise over was void, among other reasons, because of a distinction between things merely personal and chattels real. But after-

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ward, when the case came before Lord PARKER upon appeal, his lordship reversed the decree and said, "if I devise *a term* to A. and if A. die without *leaving* issue remainder over, in the vulgar and common sense, this must be intended if A. die without leaving issue at his death, and then the devise over is good." And the lord chancellor, in reference to the objection that, as the will, in the same clause and the same words, carried both freehold and leasehold estates, the same words could not be taken in two different senses, said: "It might be reasonable enough to take the same words as to the different estates in different senses, and as if repeated in two several clauses, viz.: I devise to A. my freehold land, and if A. die without leaving issue, then to B.; and I devise my leasehold to A., and if A. die without leaving issue, then to B., in which case the different clauses would (as he conceived) have the different constructions above mentioned to make both the devises good, and it was reasonable it should be so *ut res magis valeat quam pereat*." No case has been more thoroughly adopted by the Maryland decisions than this, and it presents the very case of a limitation of a leasehold estate.

In *Beauclerk v. Dormer*, 2 Atk. 314, also a leading case upon this law of executory devises and contingent limitations, Lord HARDWICKE said: "It would be of very mischievous consequence and introduce great confusion if the court should admit of a distinction between chattels personal and chattels real" in this respect. In *Peake v. Pegden*, 2 Term Rep. 720, there was a devise of leasehold premises to a grandson and the heirs lawful of him forever, "but in case he should happen to die and *leave* no lawful heir" then over, and Lord KENYON held the limitation over good on the authority of *Forth v. Chapman*, which he said had been uniformly followed by a series of decisions down to that time. The case before him he also said was that of a chattel interest, and the words "*leaving* no lawful heir" must mean leaving no issue at the time of the death of the first taker. In *Crooke v. De Voudes*, 9 Ves. 197, freehold and leasehold estates were devised in the same will to a grandson and the heirs of his body lawfully issuing, with limitation over "if he has no such heirs," and the limitation over as to both was held void, but Lord ELDON took the distinction between those words and the words "if he *leaves* no such heirs," which latter as to the leasehold estates he said would, upon the authority of *Forth v. Chapman*, import a failure at the time of his death. This case is cited with

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approval in *Newton v. Griffith*, 1 H. & G. 117. In his elaborate opinion in *Cadogan v. Ewart*, 7 Adol. & Ellis, 636, Lord DENMAN said, the words, "depart this life without *leaving* issue lawfully begotten," would, "if the question arose upon a term for years or other personal estate, now be held to mean a dying without issue living at the death of the first taker." Other authorities of equal weight might be cited to the same effect, but these must suffice to establish the distinction, and determine its applicability to devises of leasehold estates. For certain purposes under our laws a leasehold interest like the present under a lease for ninety-nine years, renewable forever, may have impressed upon it some of the qualities of real estate, but it is wanting in the essential quality which the authorities show the courts have mainly considered in establishing the distinction by which they would determine a devise over of a freehold, under a similar clause, to be void. It is still an estate less than a freehold; it does not descend *to the heir* but is assets in the hands of the executor or administrator to be administered and distributed by him as other personal property, under the authority of the orphans' court. Code, art. 93, § 220; *Williams v. Holmes*, 9 Md. 281.

Upon these authorities and for these reasons we are of opinion the limitation over in the clause of the will under review, if the subject be a leasehold estate, is not void for remoteness, and hence there was error in the court's rulings upon the prayers, for which the judgment must be reversed, and the cause remanded for a new trial.

Judgment reversed and new trial awarded.

SAUER, appellant, v. SCHULENBERG.

(23 Md. 288.)

Breach of promise to marry — measure of damages — seduction.

Where there is evidence, in an action for breach of promise of marriage, sufficient to establish the promise, the breach thereof, and the seduction of the plaintiff by the defendant subsequent to the promise, and also evidence tending to show that the seduction was procured by means of the promise to marry, the jury may consider the fact of the seduction as an aggravation of damages.

Sauer v. Schulenberg.

ACTION for breach of promise to marry, brought by the appellee against the appellant. The facts are stated in the opinion. On the trial the court instructed the jury, on request of the plaintiff, that the amount of damages rested in the discretion of the jury, who were to take into consideration all the circumstances of the case Defendant excepted. The court *refused* to charge, on request of defendant, that evidence of the carnal connection of Sauer with Schulenberg could not be considered in estimating the damages. Defendant excepted.

Judgment for plaintiff; defendant appealed.

T. R. Presttman and J. Randolph Quinn, for appellant.

Philip C. Freise, for appellee.

MILLER, J. The action is to recover damages for breach of a promise of marriage. The declaration alleges the parties agreed to marry one another; that a reasonable time for such marriage has elapsed; that the plaintiff has always been ready and willing to marry the defendant, yet the defendant has neglected and refused to marry her. The plea is, that the defendant never agreed as alleged. At the trial, the plaintiff offered evidence of the promise and of the breach, and also offered evidence of a *subsequent seduction* of the plaintiff by the defendant. At the instance of the plaintiff, the court granted an instruction that the damages to be given in this action rests in the sound discretion of the jury, under all the circumstances of the case. The appellant's objection to this instruction is, that it allowed the jury to consider the fact of *seduction* in aggravation of damages under this form of action. As the case is presented by the record, we assume there was evidence tending to show that the seduction was accomplished after and by means of the promise of marriage, and the question is, ought the jury to be allowed to take this into consideration in estimating the damages? The general rule undoubtedly is, that damages in *actions of contract* are to be limited to the consequences of the breach of contract, and that no regard is to be had to the motives which induced the violation of the agreement. That is the clear and logical result of the form of an action *ex contractu*, and the rules of pleading and evidence which govern it. It would also seem that, as the law regards seduction as an act of mutual consent and mutual criminality, for which

the woman cannot maintain an action so as to make it a ground of recovery directly, she ought not to be allowed to make it so indirectly, by using it as the basis of damages in an action of this kind, founded upon contract, and decisions of high authority have so held. The supreme court of Pennsylvania so decided in *Weaver v. Bachert*, 2 Penn. 80, where the opinion was delivered by Chief Justice GIBSON; and the court of appeals in Kentucky, in *Burks v. Shane*, 2 Bibb. 341, seem to have reached the same conclusion, though it was noted in that case that the promise, attempted to be proved, was made subsequent to the seduction, and the seduction, therefore, might have been the cause, but could not have been the consequence of that promise. But the decided weight of judicial opinion and authority, at least in this country, is, that this particular action forms an exception to the general rule. The reasoning is, that though nominally an action founded on the breach of an agreement, it presents a striking exception to the general rules which govern contracts; that it is given as an indemnity to the injured party for the loss she has sustained, and has always been held to embrace injury to the feelings, affection and wounded pride, as well as the loss of marriage; that, from the nature of the case, it has been found impossible to fix the amount of compensation by any precise rule, and, as in *tort*, the measure of damages is a question for the sound discretion of the jury in each particular instance, subject, of course, to the general restriction that a verdict influenced by prejudice, passion or corruption will not be allowed to stand. Upon this ground, it is held that where it appears the promise was made by the defendant with a view to seduce the plaintiff, and that the defendant did thereby seduce her, this will be allowed to go to the jury in aggravation. Sedgwick on Damages (3d ed.), marg. pp. 210 and 369.

In *Paul v. Frazier*, 3 Mass. 71, where the question was, whether an action for seduction could be maintained by a woman against her seducer, Chief Justice PARSONS, in delivering the opinion of the court adverse to the maintenance of the action, said: "As the law now stands, damages are recoverable for a breach of promise of marriage, and, if seduction has been practiced under color of that promise, the jury will undoubtedly consider it as an aggravation of the damages. So far, the law has provided, and we do not propose to be wiser than the law." In *Wells v. Padgett*, 8 Barb. 323, the direct question whether seduction, under a promise of marriage,

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could be used in aggravation of damages in an action for a breach of that promise, was presented, fully considered and deliberately decided in the affirmative, and the same decision has been quite recently made by the court of appeals of New York in *Kniffin v. McConnell*, 30 N. Y. 285. The decisions of the supreme courts of New Jersey, Illinois, Indiana, Missouri and Tennessee are to the same effect. *Coil v. Wallace*, 4 Zab. 291; *Zubbs v. Van Kleeck*, 12 Ill. 446; *Whalen v. Layman*, 2 Blackf. 194; *Roper v. Clay*, 18 Mo. 383; *Conn v. Wilson*, 2 Overton, 233. The instruction before us accords with these authorities, and we fully assent to the reasoning upon which they proceed, in making this action an exception to the rules which govern ordinary actions upon contract.

There being no error in this instruction, it follows, the proposition contained in the defendant's second prayer was properly rejected, if it be regarded, as it was in argument, as a counter proposition to that which we have considered as embraced in the instruction granted. But "carnal connection," which alone is mentioned in the second prayer of the defendant, is, in legal acceptance, a very different thing from seduction, and as it does not appear there was any evidence of such connection which did not result in or amount to seduction, the rejection of this prayer must, for this reason, also be affirmed.

Judgment affirmed.

MAGRUDER & BROTHER, appellants, v. GAGE.

(33 Md. 344.)

Title to goods — transfer by delivery to common carrier.

M. & B., of Annapolis, directed **A. G. & Co.**, of Boston, to send a cargo of one hundred and fifty tons of ice, and authorized them to get the freight as low as possible. The invoice was completed, shipment was made in the usual mode, and advices thereof were sent by letter. The cargo having been badly damaged in the passage, in an action by the vendors to recover the value of the ice, *held*, that the delivery to the common carrier transferred the title to the vendees, and that the vendors could recover the contract price.

If the contract of purchase be silent as to the person or mode by which the goods are to be sent, a delivery, by the vendor to a common carrier in the usual and ordinary course of business, transfers the property to the vendee
Per **ROBINSON, J.**

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ACTION to recover the purchase-money on a contract for the sale of a cargo of ice. The facts are stated in the opinion of the court. The prayer embodied in the opinion was the plaintiff's fifth prayer, and the exhibits mentioned therein are the letters, bill of lading and invoice in the statement of facts of the court.

Alex. Randall and *A. B. Hagner*, for appellants, argued,

That, in the absence of any evidence as to the terms or time of payment, the conclusion of law would be that payment was to be concurrent with delivery. *Benj. on Sales*, 499; 2 *Kent's Com.* 492.

That the fact that defendants were to pay freight is not conclusive on the question of ownership. 6 *Clark & Finnelly*, 621, 622.

That the receipt of the bill of lading and invoice is not conclusive evidence of the transfer of title and risk of carriage to defendants. *Dunlop v. Lambert*, 6 C. & F. 600; *Moakes v. Nicholson*, 115 Eng. Com. Law, 290; *Castle v. Playford*, 5 Exch. Law Rep. 165; *Shepherd v. Harrison*, 4 Q. B. Law, 196; Abb. on Ship. 326, 331, 337; *Falk v. Fletcher*, 114 Eng. Com. Law, 403; *Benj. on Sales*, 213; *Conger v. Chicago Railroad Company*, 17 Wis. 487.

Frank H. Stockett and *William H. Tuck*, for appellee, argued that, where goods are consigned to A., and there is no agreement to the contrary, he is henceforth the owner. *Powell v. Bradlee*, 9 G. & J. 276; Abb. on Ship. 403 (326); *Hall v. Richardson*, 16 Md. 397; Chitty on Cont. 383; *Benj. on Sales*, 130; *Dunlop v. Lambert*, 6 Cl. & Fin. 600; *Franklin v. Long*, 7 G. & J. 407; *Mulliken v. Boyce*, 1 Gill, 60; Pars. on Cont. 445; *Godfrey v. Furzo*, 3 P. Wms. 185; *Snee v. Prescott*, 1 Atk. 249; *Vale v. Boyle*, Cowp. 294.

ROBINSON, J. The appellants, residents of Annapolis, wrote to the appellees, ice dealers in Boston, to know upon what terms they would sell to them a cargo of ice, in answer to which they received the following reply:

"For a cargo to be shipped before the 10th of July we shall charge you \$5 per ton, and will get the freight as low as possible."

By letter of July 1st, 1863, the appellants directed the appellees to send a cargo of one hundred and fifty tons, and authorized them to get the freight as low as possible. On the 13th of July, the appellees wrote to the appellants advising them of the shipment, inclosing account for same and the bill of lading. This letter, with

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the inclosed papers, was received by the appellants in due course of mail. By the bill of lading it appears that the ice was shipped in good order and condition on board of the schooner Rio, lying in the port of Boston and bound for Annapolis, to be delivered in like good order and condition to the appellants or to their assigns, he or they paying the freight and accustomed average.

The schooner encountered rough weather, and was compelled to put into New York with damaged sails. After refitting she resumed her voyage, and reached Norfolk on the 18th of August in a sinking condition. The remnant of her cargo was sold in Norfolk under the captain's supervision, and the surplus arising from the proceeds of sale, after the payment of freight and charges, amounting to \$222, was handed over to the appellants, and by them remitted to the appellees, who refused to receive the same. This is an action of contract brought by them against the appellants to recover the value of the cargo of ice.

The main question in this appeal, and one which we think decisive of the case, arises upon the following prayer granted by the court:

"If the jury find from the evidence that the plaintiffs in 1863 were partners in trade and dealers in ice, under the name and firm of Addison, Gage & Co., in the city of Boston, Mass., and that the defendants were trading under the name of Magruder & Brother, in the city of Annapolis, on the 3d of June, in the year 1863, and as such firm wrote to the plaintiffs the letter offered in evidence of that date, and proved under the commission as Exhibit E, and that the plaintiffs, in reply thereto, wrote to the defendants the letter dated June 22d, proved under the commission as Exhibit H, and that, on the 1st of July, the defendants addressed to the plaintiffs the letter returned with the commission and marked A, and that, on the 6th of July, the plaintiffs wrote to the defendants the letter of that date marked B, and that these letters were received by the persons to whom they were respectively addressed, and that the plaintiffs did, on the 11th of July, 1863, ship on board the schooner Rio one hundred and fifty tons of ice, at and from the port of Boston to Annapolis, consigned to the defendants, and that the said schooner sailed on her said voyage on the 11th of July, 1863, and that the plaintiffs sent by the mail of the 13th of July, 1863, to the defendants the bill of lading and invoice of said shipment marked F and G, and that these were received by the defendants in due

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course of mail, and that the plaintiffs made no other agreement in reference to the sale and delivery of said ice than is shown by the said letters, bill of lading and invoice, then the plaintiffs are entitled to recover the value thereof of said ice, after deducting any amount which the jury may find to have been paid to plaintiffs."

This prayer asserts, as a proposition of law, that the facts therein stated, in the absence of any other agreement on the part of the plaintiffs in regard to the delivery of the ice, constituted a complete sale and delivery of the same to the defendants.

The question as to what acts are necessary to be performed by a vendor under an executory agreement for the sale of unspecified goods, in order to transfer the title to the vendee and subject him to the risk of the carriage, depends entirely upon the agreement, either express or implied, between the parties. If the vendor undertakes to make the delivery himself at a distant place, thus assuming the risk in the carriage, the carrier becomes the agent of the vendor, and the property will not pass until the delivery is actually made. On the other hand, if the goods are delivered to a carrier specially designated by the purchaser, he becomes the agent of the latter, and the title to the property, as a general rule, will pass the moment the goods are dispatched. Should the contract of purchase be silent as to the person or mode by which the goods are to be sent, a delivery by the vendor to a common carrier in the usual and ordinary course of business transfers the property to the vendee. Or, as Mr. BENJAMIN expresses it in his late Treatise on Sales, "where goods are delivered by the vendor, in pursuance of an order, to a common carrier for delivery to the buyer, the delivery to the carrier passes the property, he being the agent of the vendee to receive it, and the delivery to him being equivalent to a delivery to the vendee." Benjamin on Sales, 288. So early as the case of *Dutton v. Solomonson*, 3 B. & P. 582, Lord ALVANLEY said, he considered it as settled law "that, if a purchaser order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to a carrier, it operates as a delivery to the purchaser."

It is unnecessary to cite authorities in support of this well-established rule. The cases are collected and reviewed in a very satisfactory manner in Benjamin on Sales, 246-271, and the rule will be found recognized in its broadest terms by all of the elementary

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writers on the subject. Story on Sales, § 306; Hill on Sales, top p. 119; Chitty on Con. —.

If, therefore, in this case, the appellants directed the appellees to send them a cargo of ice, and they delivered it to a common carrier to be freighted for and on account of the appellants, and there was no other agreement in regard to the sale and delivery of the same, the court was right in saying to the jury that the title passed to the appellants, and that the appellees were entitled to recover.

None of the cases relied on by the appellants are in conflict with these views. In *Dunlop et al. v. Lambert et al.*, 6 Clark & Fin. 600, the suit was brought by the *consignor* against the *carrier* to recover for the loss of the goods, and it was decided that, although as a general rule where goods are delivered to a carrier, the *consignee* is the proper person to bring the action against the carrier, yet, if the consignor makes a special contract with the latter for the carriage, such a contract supersedes the necessity of showing the ownership in the goods, and the *consignor* may maintain the action against the *carrier*, though the goods may have been the property of the *consignee*. The lord chancellor, however, said: "It is no doubt true, as a general rule, that the delivery by the consignor to the carrier is a delivery to the consignee, and that the risk is, after such delivery, the risk of the consignee. This is so, if, without designating the particular carrier, the consignee directs the goods shall be sent by the ordinary conveyance; the delivery to the ordinary carrier is then a delivery to the consignee, and the consignee incurs all the risk of the carriage." In that case evidence was offered that by the terms of the contract the seller was to deliver the *puncheon* on the quay at Newcastle-upon-Tyne, before the title was to pass to the purchaser; and it was held that the lord president in the trial below erred in stating it as a rule without an exception, because the freight and insurance were paid by the consignor, who charged the consignee with their amount, the risk was therefore necessarily with the consignee—that there was consequently no right to inquire what was the particular transaction between the parties. In other words, the court below had erred in excluding from the jury the agreement between the parties in regard to the delivery of the puncheon.

But no such objection can be urged against the prayer of the court in this case. The question, as to whether there was any other agreement between the appellants and appellees in regard to the

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sale and delivery of the ice than that to be found in the correspondence and bill of lading, was fairly submitted to the jury, and the plaintiffs' right to recover, upon the finding of the facts set forth in the prayer, was based upon the express proviso that there was no other agreement in regard to the delivery of the ice.

In *Blanchard et al. v. Page et al.*, 8 Gray, 281, the action was also brought by the consignor against the carrier upon a special contract, and the precise question in the case, says SHAW, C. J., is "whether the plaintiffs, named as shippers of the goods in the bill of lading, may maintain an action for damages done to the goods, after they were received by the defendants at the ship for the purpose of carriage, and before they were delivered to and received by the consignees, at New Orleans, named in the bill of lading, although it is shown by evidence *aliunde* that the plaintiffs had no right of property, general or special, in the goods, and no other right or interest in their safe carriage, except that arising from the bill of lading." It was held that the consignor could maintain the action upon the special contract for the carriage of the goods, although the court admitted that the delivery of them to a common carrier vested the general property in the purchaser.

Exceptions to the general rule, as above stated, it is true, are to be found arising in cases where, by the express terms of the bill of lading, the goods are to be delivered to the consignor or his assigns, or where there is some other evidence showing the intention of the consignor to retain the property, notwithstanding the delivery to the carrier. This is frequently done where the parties, living at a distance from each other, contract by correspondence, and where the vendor is desirous of securing himself against the insolvency or default of the buyer. The cases of *Warle v. Baker*, 2 Ex. 1, *Jenkyns v. Brown*, 14 Q. B. 496, and *Ellershaw v. Maginac*, 6 Ex. 570, were decided upon this principle.

The decision of the law arising upon this prayer makes it unnecessary to consider the other exceptions relied on by the appellants.

Finding no error in the ruling below, the judgment will be affirmed.

Judgment affirmed.

J. G. v. H. G.

J. G., appellant, v. H. G.

(33 Md. 401.)

Void marriage—impotency—effect of deed of separation.

Where the wife is possessed of an organic defect rendering coition imperfect and conception impossible, which defect existed at the time of the marriage, and is conceded to be permanent, the marriage contract is void *ab initio*, on the ground of impotency, and a deed of separation voluntarily entered into by the husband and wife will not bar a subsequent application by the husband for a divorce *a vinculo* on the ground of such impotency.

ACTION by a husband to annul a marriage contract on the ground of the impotency of the wife. The facts are stated in the opinion of the court.

Geo. Wm. Brown and *I. Nevett Steele*, for appellant, argued :

That the defects complained of were sufficient to annul the marriage. Article 16, § 25, Code of Pub. Gen. Laws of Md.; 1 Bishop on Marr. and Div. §§ 325 to 340; *Deane v. Aveling*, 1 Rob. Eccl. Rep. 279; *Briggs v. Morgan*, 3 Phill. 325, 1 Eng. Eccl. Rep. 408; *Brown v. Brown*, 28 Eng. L. & E. 95; *Ewens v. Tytherleigh*, 9 Law R. (N. S.) 424; *X, falsely called Y. v. Y.*, 34 Law Jour. 81; *Lewis v. Hayward*, 15 Law Rep. 299.

That the deed of separation was no bar to this application. 1 Bishop on Marr. and Div. §§ 631 to 639, and §§ 646 to 656; *Matthews v. Matthews*, 1 Sw. & T. 499, and 3 id. 161; *Spering v. Spering*, id. 211; *Hunt v. Hunt*, 32 Law J. 168; *Williams v. Williams*, 35 id. 85; *Lippy v. Masonheimer*, 9 Md. 316; *Benton v. Benton*, 1 Day, 116; *Calkins v. Long*, 22 Barb. 97-106; *St. John v. St. John*, 11 Ves. 525; *Durant v. Durant*, 1 Hagg. 733; *Beeby v. Beeby*, id. 789.

S. Teackle Wallis, for appellee, argued, that the defects did not amount to impotency within the legal definition of the term, and that the deed of separation was a bar to the present action. *Brown v. Brown*, 5 Gill, 254, 255; *Devenbagh v. Devenbagh*, 5 Paige, 558; *Wilson v. Wilson*, 1 House of Lords' Cases, 554-574, and 5 id. 40-59; *Jodrell v. Jodrell*, 9 Beav. 53, and 14 id. 397; *A v. B.*, 1 Prob. & Div. (L. R.) 561; *Brown v. Brown*, 7 Eq. Cas. (L. R.)

191; *Sille v. Harding*, 8 id. 492; *Williamson v. Williamson*, 1 Johns. Ch. 491; *Sanders v. Rodway*, 16 Beav. 207; 3 Leading Cas. Eq. 238, 389, 403, 404; *Hartle v. Stahl*, 27 Md. 157; 1 Bishop on Marr. and Div. 105-339; *Matthews v. Matthews*, 1 S. & T. 501, and 3 id. 163.

BARTOL, C. J. The bill of complaint in this case was filed by the appellant, praying for a divorce *a vinculo*, on the ground of the alleged impotence of the appellee.

It appears from the pleadings and proofs that the parties to this suit were married in Baltimore, on the 31st day of March, 1864, the appellant then being forty-nine years of age and the appellee twenty-eight. They started on a tour to the west immediately after the marriage. Physical impediments to the consummation of the marriage having been discovered, the appellee submitted to an examination of her person by Dr. Thomas Wood and Dr. S. O. Almy, eminent physicians and surgeons of Cincinnati, whose testimony is contained in the record. After the return of the parties to Baltimore, on the 25th of May, 1864, another surgical examination was made by Dr. Inloes, the family physician of the appellee, aided by Prof. Nathan R. Smith. The testimony of these physicians is also in the record.

On the 29th day of June, in the same year, a deed of separation was entered into, whereby the sum of \$10,000 was conveyed and secured by the appellant to certain trustees therein named, for the separate use of the appellee for her support, she agreeing to relinquish all further claim or interest in his estate, and the parties mutually agreeing to live separate from each other, as if unmarried.

The separation under the deed continued for nearly three years, when, on the 8th day of May, 1867, this bill was filed. One of the prayers of the original bill was that the deed of separation might be set aside; but in the progress of the cause, on the 15th day of February, 1869, a paper was filed by the complainant, signed by his solicitors, waiving all that part of the bill and the prayer therein seeking to set aside the deed of settlement, and leaving all vested rights in the trustees and in the appellee under the deed unassailed, and unaffected by any decree in the cause. The only question, therefore, presented by this appeal arises upon the prayer for a divorce.

The appellee opposes the application for a divorce upon two distinct grounds: 1st. The alleged impotence is denied. 2d. It is

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contended that the deed of separation is a bar and estoppel to the right of the complainant to maintain the present suit.

"The impotence of either party at the time of the marriage" is one of the causes prescribed in the code, for which the court is authorized to decree a divorce *a vinculo matrimonii*. 1 Code, art. 16, § 25.

Has the alleged impotence of the appellee been proved? A careful examination of the evidence has convinced us that this question must be answered in the affirmative.

Without repeating here at length, or in detail, the evidence on this most delicate and painful question, it may be stated that the testimony of the examining surgeons establishes the following facts:

That the physical condition of the appellee, at the time of the marriage, was that of a very imperfect development of the sexual organs, both externally and internally. These organs were in a rudimentary condition, evincing that their development had ceased and been arrested before the age of puberty. She had never experienced the monthly sickness to which females of mature age are subject; and was without the natural passion or desire incident to woman.

The rudimentary condition of her sexual organs, and their imperfect development, not only rendered conception impossible, but there was on her part an incapacity for *vera copula*. That is to say, she was not capable of the act of generation in its natural and ordinary meaning, but only of incipient and imperfect coition.

In giving the results of their examination, the surgeons differ somewhat as to the degree or extent of the organic defects; but we have stated the conclusions which appear to us to be established by their testimony. They all concur in saying that the defect is incurable.

Whatever differences of opinion may have arisen as to the legal definition of impotence, it is well settled that if, by reason of malformation or organic defect existing at the time of the marriage, there cannot be natural and perfect coition, *vera copula*, between the parties, and it appears that the defect is permanent and incurable, the case comes within the legal definition of impotence, and is cause for nullity of marriage. *Deane v. Aveling*, 1 Rob. Ecc. 279; *Devenbagh v. Devenbagh*, 5 Paige, 554; 1 Bishop on Marr. and Div., §§ 325 to 340.

The charge made by the appellee in her answer that the difficulty in consummating the marriage proceeded from physical defect or incapacity on the part of the appellant has not been sustained by proof; and we are of opinion upon all the evidence in the cause that the appellant is entitled to a divorce, *a vinculo*, unless by reason of the deed of separation he is barred and estopped from maintaining this suit. This brings us to the examination of the second ground of defense.

What is the effect of the deed of separation upon the rights of the appellant in the present suit?

By the act of assembly of 1841, chapter 262, and its supplements, now embodied in the code, article 16, section 24, *et seq.*, jurisdiction of all applications for divorce has been given to the courts of equity. Under that provision this suit has been instituted.

The court in such case sits, not in the exercise of its general and ordinary equitable jurisdiction, but as a divorce court, and must be governed by the rules and principles established in the ecclesiastical courts in England, wherein a similar jurisdiction has been exercised, so far as they are consistent with the provisions of the code. By the 14th section of article 16, the court expressly provides that all causes for alimony "are to be heard and determined by courts of equity in this State, in as full and ample a manner as they could be heard and determined by the laws of England, in the ecclesiastical courts there."

In respect to the mode in which courts of equity shall exercise jurisdiction in divorce cases, and the principles by which they are to be governed, the code is silent. But from the nature of the jurisdiction itself, it has always been considered that the decisions of the English ecclesiastical courts, in similar cases, may properly be referred to as precedents; and they have uniformly been cited and relied on as safe and authoritative guides for the courts of this State, in disposing of cases of this kind.

If we refer to those precedents, it appears to have been long settled that a voluntary deed of separation between husband and wife is not *per se* a bar to a suit in the ecclesiastical court for a restitution of marital rights, or to a petition for divorce. *Durant v. Durant*, 1 Hagg. 733 ; 3 Eng. Ecc. 310; *Beeby v. Beeby*, 1 id. 789 ; id. 338; *Westmeath v. Westmeath*, 2 Eng. Ecc. Supp. 1 ; 4 id. 238; *Spering v. Spering*, 3 Swabey & Trist. 211; *Hunt v. Hunt*, 32 Law J. 168.

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In 1 Bishop, section 634 and note 3, other cases are referred to in support of the general proposition above stated.

Some cases have arisen, upon applications for divorce in the ecclesiastical courts, in which a voluntary deed of separation between the parties has been considered, in connection with lapse of time and other circumstances, as sufficient to show that the application was not made *bona fide* for the cause assigned, but for some sinister or collateral purpose, and the application, for that reason, has been denied. Such were the cases of *Matthews v. Matthews*, 1 Swabey & Trist. 161, and *Williams v. Williams*, 35 Law J. 85, decided in 1866.

But, as we have said, such a voluntary deed has never been considered *per se* as a bar to the suit.

The cause for which the divorce in this case is claimed, as stated in the bill and established by the proof, is one which, by the ecclesiastical law as well as by our code, would, when judicially established, render the marriage null and void, *ab initio*. No case can be found in which an application for a sentence of nullity of marriage for such cause has been held, in the ecclesiastical court, to be barred or defeated by reason of a voluntary deed of separation entered into between the parties; and, in our opinion, it would be alike unjust and against reason and public policy, as it is without precedent, so to hold.

The case of *Brown v. Brown*, 5 Gill. 249, has been cited as an authority to show that, in this State, a voluntary deed of separation between the parties is a bar to an application for divorce.

We do not so interpret that decision. In that case the application was for a divorce *a vinculo*; the cause for the divorce, charged in the bill filed by the husband, was an abandonment by the wife, which was alleged to have taken place in the spring of 1836 and to have continued ever since. The bill was filed in July, 1846.

It appeared that in April, 1846, only a few months before the filing of the bill, the parties entered into a voluntary deed of separation, whereby they agreed to live separate and apart from each other; certain property was secured to the wife for her support, all her rights to her husband's estate were relinquished, and he was secured from liability for her debts.

The chancellor, in his opinion, which was adopted by the court of appeals, after suggesting doubts whether, upon a true construction of the acts of assembly, the case stated in the bill came

within their provisions, placed his decision refusing the divorce upon the effect of the deed and the absence of any circumstance which had subsequently transpired to render it necessary or proper that the relation of the parties, as established by that instrument, should be changed.

Now, looking to the only ground upon which the divorce in that case was claimed, as being an alleged abandonment by the wife, it is very obvious that the deed operated as a condonation of the offense, or as an acquiescence in the separation on the part of the husband, which so far affected his equitable rights to claim a divorce on that ground, as in the absence of any fact or circumstance occurring after the execution of the deed to justify his application for a divorce, authorized the court to infer that the application was not made *bona fide* for the cause alleged; and the divorce might properly be refused on grounds similar to those stated in *Matthews v. Matthews* and *Hunt v. Hunt*, above cited.

In the very recent case of *Parkinson v. Parkinson*, reported in 1870, in Law Rep., parts 5 and 6 (cases in Probate and Divorce, page 25), which was a petition by the wife for a divorce, upon the ground of desertion or abandonment by the husband, the parties were married in July, 1861, and the alleged desertion took place in 1865. It appeared that the parties entered into a deed of separation in April, 1866. It was alleged in the petition and so appeared by the proof, that the husband, from the time of the alleged desertion, had been living in adultery.

At the hearing the court decided that the wife had, by the deed, "bargained away her right to relief on the ground of desertion;" but "that she was entitled to a judicial separation on the ground of adultery if she applies for it."

The effect of that decision is, that such a deed operates as a condonation of the offense of abandonment; and to that extent is consistent with the decision of the court of appeals in *Brown v. Brown*, but it is no bar to a suit for divorce for adultery, although it appeared that offense was known to the wife at the time the deed was executed. And, in this respect, the case is an authority against the position contended for here by the appellee.

We think it is very clear upon the authorities, that the deed of separation in this case is not *per se* a bar to the maintenance of the present suit. There is no evidence in the case to impeach the good faith or *bona fides* of the appellant in bringing this suit. The only

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circumstance relied on by the appellee for that purpose is the lapse of time after the execution of the deed, before filing the bill. But this is satisfactorily explained by the proof in the record. It appears the complainant was restrained from instituting this proceeding by conscientious scruples, supposing it to be inconsistent with his religious duty to seek a divorce for any cause; and it appears, also, that the same motive led him to enter into the deed for an amicable separation.

Those conscientious scruples were afterward removed by a decision upon the subject, rendered by the highest ecclesiastical tribunal of the church of which he and the appellee are members, and to whose authority he felt himself bound to submit, declaring the marriage null. These facts disclosed in the record, while they in no otherwise affect the rights of the parties in this cause, are a sufficient answer to the suggestion, that the appellant has lost his remedy by *aches* or acquiescence, or that his application for a divorce has not been made in good faith and for the cause assigned. It has been argued on the part of the appellee, that, although in the divorce court, the deed may not operate *per se* as a bar or estoppel to the suit, yet that a court of equity would in the present case, upon a bill filed on behalf of the appellee for that purpose, issue an injunction to restrain the appellant from prosecuting a suit for divorce, as being contrary to the terms of the deed, and in violation of the covenants therein. And this proceeding, being in a court of equity, it has been argued that, for the reason stated, the divorce ought to be denied.

In support of this position, we have been referred to the decision of the house of lords in *Wilson v. Wilson*, 1 H. of L. 538, and 5 id. 40.

We have carefully examined that case, and are of opinion that it ought not to be accepted as a binding authority in support of the appellee's position here. It seems to us that the learned court, when that case was first before them, went farther than was justified by antecedent decisions. There the deed of separation contained a covenant on the part of the husband *not to institute any suit in the ecclesiastical court for restitution of conjugal rights*. The chancellor granted an injunction restraining him from proceeding in the ecclesiastical court contrary to his covenant, and on the first appeal the decree of the chancellor was affirmed. It appears, however, when the cause went up to the house of lords on the

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second appeal, grave doubts were expressed whether the court had not gone too far; and while it was held that the former decision must be adhered to as the law of that case, it may be inferred from the opinions expressed by the learned judges, among whom was Lord St. LEONARDS, that it was not to be considered as a precedent for a court of chancery to interfere by injunction for the enforcement of voluntary deeds of separation between married persons, any farther than to compel their observance, so far as rights of property may be concerned. To that extent courts of chancery will support and enforce the stipulations of such deeds, when they are made in good faith, and are equitable in their terms, but no farther. And, in our judgment, it would be against public policy and contrary to the uniform current of decisions, to hold that the right of the appellant to relief in this case is barred or defeated by the deed of separation.

The decree of the circuit court will be reversed, and a decree will be signed divorcing the parties *a vinculo matrimonii*.

*Decree reversed and decree divorcing the
parties a vinculo matrimonii.*

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(33 Md. 412.)

Del credere agent—Liability of agent to principal—Indorser of dishonored draft.

A *del credere* agent collected a bill of goods due his principals from a customer, and placed the amount to his own account with his bankers, and purchased of them a gold draft, which he caused to be made payable to his own order without reference to his character as agent, and, after indorsing it to his principals or their order, transmitted it to them in payment not only of the price of the goods sold to the customer, but also of a balance due from himself. The draft was dishonored and returned to the agent, who treated the loss as his own, and promised to send another draft, and in the mean time unsuccessfully solicited payment of the draft from the drawers to himself and then caused himself to be made a preferred creditor of the drawers, who had failed. In an action by the principals against the agent, to recover the amount of the draft, *held*,

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1. That the contract resulting from the *del credere* character of the agent was not entirely discharged in the payment of the money by the customer to the agent.
2. That the agent was further liable, after the receipt of the money, either by virtue of the *del credere* commission, or by his indorsement of the draft, although he had used ordinary diligence in transmitting the money.
That the promise of the agent to assume the debt after the dishonor of the draft was not valid unless he had full knowledge of the neglect of his principals in making demand, and in giving notice of the dishonor of the draft.

The relation of a *del credere* agent to his principal is that of debtor and creditor, and he is bound absolutely to see that his principal is paid.

ACTION to recover the amount of a draft for \$2,283.30 in gold coin.

The facts of the case appear in the following prayers:

The plaintiff prayed —

1. If the jury shall find that the defendant was the factor of the plaintiffs and had guaranteed, for a commission, the payment of certain purchases of Edwin Akers from the plaintiffs, payable in gold or its equivalent; and that such payment was actually made to the defendant on or about the 25th of April, 1866; and that the defendant deposited the amount with Bayne & Co., of Baltimore, and on the 27th of April, 1866, purchased a gold draft for such amount, and for an additional sum due from himself to plaintiffs, upon Hoyt, Anthony, Douglas & Co., in New York, payable in that city April 30, 1866; and that said draft was drawn to the order of the defendant (under his business name of O. Brehme & Co.), at his request; that he indorsed it specially to the plaintiffs by such business name, and sent it to the plaintiffs in Philadelphia, who received the same the next day, April 28th, and immediately indorsed it and transmitted it to New York for collection; and that the said draft was presented for payment on the 30th of April, to Hoyt, Anthony, Douglas & Co., and was dishonored, and the fact of such dishonor was telegraphed on the next day to the plaintiffs, who immediately telegraphed notice of the dishonor and non-payment of said draft to the defendant; and that the defendant endeavored to procure payment of the draft to himself, from the drawers, Bayne & Co., and, not succeeding in this, procured himself (under the name of O. Brehme & Co.) to be made one of the preferred creditors in an assignment made May 5, 1866, by Bayne & Co.,

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for the benefit of creditors; and that the plaintiffs have never been paid the amount of said draft: then they are entitled to recover the amount thereof in gold, or its equivalent, from the defendant.

2. (The second prayer, after setting forth the same facts, proceeded substantially as follows:) If the jury shall find that, after the dishonor and return of the draft, the defendant treated the loss as his own, and promised to send another draft; and that the plaintiffs relied on such promise; and that the defendant did not inform the plaintiffs of his design to throw the responsibility of collecting the draft upon them until the year 1867; or of his intention to refuse to pay the draft himself, until such time: then the plaintiffs are entitled to recover, although they may find that the defendant acted only as agent of the plaintiffs in transmitting the money, and purchased the draft in good faith.

3. (The third prayer, after repeating the facts of the first prayer, is substantially as follows:) If the jury shall find that, at the time the defendant purchased the draft, the said banking-house of Bayne & Co. had failed and were unable to meet their obligations, and the defendant might have ascertained the fact by the exercise of ordinary care and diligence: then the plaintiffs are entitled to recover the whole amount and interest.

The prayers of the plaintiffs were rejected.

The defendant prayed —

1. (After setting forth the fact that the defendant had agreed, for a commission, to guaranty the payment of all purchases of said Akers, whether made of the plaintiffs directly or through himself, this prayer proceeded substantially as follows:) If the jury shall find that the goods, the price of which is in controversy, were sold directly to Akers by plaintiffs, and that payment thereof was made to the defendant, then such payment discharged the obligations of the contract of guaranty.

2. (After setting forth substantially the same state of facts as are found in the first prayer of the plaintiffs, this prayer proceeds about as follows:) If the jury shall find that the form of the draft, and the mode of remittance and the purchase of the draft, were according to the usual custom and in good faith, and that the defendant acted with ordinary caution and diligence, then the plaintiffs are not entitled to recover so much of the amount of said draft as was covered by the bill of said Akers. The court granted the prayers of the defendant. Verdict for \$75.27 for plaintiffs, which not being

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within the jurisdiction of the court, judgment of *non pros.* was entered and plaintiffs appealed.

Wm. F. Frick, for appellants:

William A. Fisher and *Charles Marshall*, for appellees, argued that the defendant was not a *del credere* agent, and even if he were, his guaranty only extended to the payment of the money by the debtor. Para. Mer. Law, § 9, chaps. 10, 15; Story on Agency, § 215; *Thompson v. Perkins*, 3 Mason, 236; *Morris v. Cleasby*, 4 Maule & Selw. 574; *Goodenou v. Tyler*, 1 Am. Lead. Cases, 668; *Henback v. Mollman*, 2 Duer, 227; *Muller v. Bohlens*, 2 Wash. C. C. 378; *Peele v. Northcote*, 7 Taunt. 478. The *del credere* factor does not guarantee the safe transmission of the fund. Cases cited above and *Leverick v. Meigs*, 1 Cow. 645; *Sharp v. Emmett*, 5 Whart. 288, 299; *Gorman v. Wheeler*, 10 Gray, 362. The defendant was not liable as indorser, he signed as agent. *Castrigue v. Battigieg*, 10 E. F. Moore, Privy C., 94; *Sharp v. Emmett*, 5 Whart. 288; Chitty on Bills, 34. That the security accepted by the defendant was for the benefit of the plaintiffs, and even if defendant assumed the liability he would not be responsible under all the circumstances. *Gorman v. Wheeler*, 10 Gray, 362; *Wyman v. Gray*, 7 H. & J. 409; *Jones v. Ashburnham*, 4 East, 455.

ALVEY. J. It is conceded in this case that the defendant was the agent of the plaintiffs for the sale of goods, and that, in addition to the commission allowed the defendant as ordinary agent, an additional commission was agreed to be allowed, and was actually allowed, for and in consideration of the defendant's guaranty of payment of all bills of goods purchased of the plaintiffs by a certain customer, who was, through the agency of the defendant, induced to deal with the plaintiffs, merchants in Philadelphia, and such additional commission was to be paid whether the purchases were made by the particular customers directly of the plaintiffs, or through the defendant as their agent. The customer having purchased goods of the plaintiffs, and paid for them to the defendant, the agent, and the money having been lost in the manner disclosed in the evidence, and stated in the prayers of the respective parties, the question is, upon whom is that loss to fall?

It is insisted on the part of the plaintiffs that the defendant,

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being an agent, acting under a *del credere* commission, is bound to pay, not conditionally, but absolutely, as if he were himself the vendee of the goods; and that, consequently, he did not discharge his liability by the purchase and transmission of the gold draft of the 27th of April, 1866. And even if the liability of the defendant, by reason of the *del credere* commission, be not maintainable to the extent contended for, still, the plaintiffs insist that as ordinary agent, whose duty it was to remit funds to his principal, the defendant having procured the draft payable to his own order, and indorsed it to the plaintiffs without excluding recourse, is, under all the circumstances attending the transaction, liable as indorser, the drawer having failed, and the draft meeting with dishonor.

On the other hand, the defendant contends that his relation to the plaintiffs was not that of a *del credere* agent or factor, strictly speaking; but that if he be so regarded, the guaranty, in consideration of the commission, only extends to the payment of the money for the goods by the vendee, and not to its safe transmission to the vendor; and that, consequently, the guaranty was gratified and discharged when the money was paid by the purchaser to the defendant as the plaintiffs' agent. He also contends that he is not liable as indorser of the draft transmitted, because of the relation of principal and agent existing at the time between the plaintiffs and himself, in reference to which the draft was purchased, and that, acting for the convenience of the plaintiffs, he can only be held responsible for good faith and ordinary diligence.

These positions of the parties were sought to be maintained by them at the trial in the court below, and with that view they propounded prayers for instruction to the jury; but the court rejecting those of the plaintiffs, and granting those offered by the defendant, the plaintiffs have brought those rulings to this court for review, and whether they be correct or otherwise, according to our judgment, will appear in the sequel of this opinion.

We cannot resist the conclusion that the defendant was, at the time of the transactions involved in this controversy, strictly a *del credere* agent of the plaintiffs; although the nature and extent of the obligations imposed upon such an agent has been variously stated, and, in regard to it, down even to the present time, no little conflict will be found to exist among judges and authors of the highest repute. On the one hand there are those who maintain that an agent *del credere* for the sale of goods makes himself absolutely

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and in the first instance liable to his principal for the price of the goods sold; while on the other hand it has been strongly maintained that such an agent only incurs a secondary responsibility, that of mere surety, whereby he can be required to pay only in the event of failure on the part of the principal debtor. And some of the authorities have gone to the extreme of maintaining that the undertaking of the agent, under a *del credere* commission, is a mere guaranty of the debt of another, and, therefore, within the statute of frauds. Which of these positions is correct depends, to a great extent, upon the state of the authorities, the question never having been finally adjudicated in this State.

Whenever an agent, in consideration of additional commission, such as was agreed to be allowed in this case, guarantees to his principal the payment of debts that become due through his agency, he is said to act under a *del credere* commission. What then is the nature and extent of this guaranty? In *Grove v. Dubois*, 1 T. R. 112, a case of a policy broker, Lord MANSFIELD answered this question in very plain and unqualified terms when he said, "It is an absolute engagement to the principal from the broker, and makes him liable in the first instance. There is no occasion for the principal to communicate with the underwriter, though the law allows the principal, *for his benefit*, to resort to him as collateral security. But the broker is liable at all events." In this Mr. Justice BULLER concurred, and said that he had known many actions to have been brought against brokers with commission *del credere*, and that he had never heard any inquiry made in such cases, whether there had been a previous demand upon the underwriter and refusal; and he declared that such was not the practice. Thus showing, according to the opinions of these great judges, that the obligation of such undertaking was primary and absolute in its character, and that the agent was regarded as standing in the relation to his principal of an original debtor.

Ten years after the case of *Grove v. Dubois*, the case of *Mackenzie v. Scott*, 6 Bro. P. C. 280, occurred in the house of lords, on an appeal from the court of sessions in Scotland. That case was very analogous in its circumstances to the one before us. There, a factor, under a commission *del credere*, sold goods and took accepted bills from the purchasers, which he indorsed to a banker at the place of sale, and received the banker's bill for the amount, payable to him, the factor's, own order, on a house in London. This banker's bill

the factor indorsed and transmitted to his principal, who got the same accepted. The acceptors and drawer having failed before payment, it was held, according to the head note of the case, that the factor was answerable for the amount of the bill, being personally liable under his commission, *del credere*, to satisfy his principal the price of the goods sold.

It was insisted in that case, as it has been in this, that the *del credere* obligation extended only to guaranteeing the payment of the price of the goods by the vendee, and that the remittance of the money by the factor was a transaction entirely different and distinct. But, if the uniform interpretation of that case be correct (there being no reasons assigned for the judgment given), the argument in that respect did not avail; and, in view of the law as it had been announced in *Grove v. Dubois*, it is not difficult to perceive upon what ground that decision was based. And afterward, in 1803, the same general proposition was again pointedly asserted as the law of England in the case of *Houghton v. Matthews*, 3 Bos. & Pull. 489.

By these decisions the law was regarded as settled in England, until about the year 1816; and all the text-writers, and authors of elementary treatises upon the subject of commercial contracts before that time laid it down, as the unquestionable law, that an agent, acting under a commission *del credere*, was bound to his principal in the first instance and as an original debtor. The law will be found so stated by Livermore, in his work on Agency, 409, 410; Paley on Agency, 40; Comyn on Contracts, vol. 1, 253; and Chitty in his work on Common Law, vol. 3, 222.

But it is said that the cases to which we have referred do not now announce the law as accepted in England, and we are referred to the case of *Morris v. Cleasby*, 4 Maule & Selw. 566, decided in 1816, and the cases following on its authority, to show how the rule has been qualified if not entirely changed.

It is true, in the case of *Morris v. Cleasby*, Lord ELLENBOROUGH did express a decided dissent from the principle announced in the previous decisions, both as to the nature and scope of the *del credere* obligation. He said that the guarantor, in consideration of the commission, is only to answer for the solvency of the vendee, and to pay the money if the vendee does not; and that, on the failure of the vendee, the agent is to stand in his place and make his default good, thus clearly placing the agent in the position of mere surety

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to the purchaser of the goods. And if such be the true nature and character of the contract, seeing that it is entirely collateral and secondary, it is difficult to perceive how it can escape the operation of the statute of frauds. Be that, however, as it may, the decision of Lord ELLENBOROUGH was sanctioned by the case of *Peele v. Northcote*, 7 Taunt. 478, and also impliedly sanctioned by the case of *Gall v. Comber*, 7 Taunt. 558, in the common pleas. And from the time of these last decisions, until very recently, all the treatises on commercial contracts have stated the law in accordance with the opinion of Lord ELLENBOROUGH, taking the doctrine of Lord MANSFIELD to have been overruled. It is so stated in Chitty on Contracts; Russell on the Law relating to Factors and Brokers; Smith's Commercial Law, and in other works treating of the subject.

Nor has there been uniformity of decision on the subject in the courts of this country; though we think the decided weight of authority is in support of the doctrine as announced in *Grove v. Dubois*. In the case of *Thompson v. Perkins*, 3 Mason C. C. 232, before Judge STORY, in 1823, the principle of *Grove v. Dubois* was repudiated as being incorrect, and that of *Morris v. Cleasby* sanctioned; though the facts of the case do not appear to have required a distinct ruling upon the particular question now presented. It was an action of *assumpsit* by the principal against the assignee of the factor *del credere* who had sold the goods of his principal and taken negotiable notes, payable on time, in his own name, for the amount of sales; and afterward, and before the notes became due, the factor failed, and assigned the notes to his assignee for the benefit of his creditors, and the assignee afterward receiving the money due on the notes, it was held that the principal was entitled to recover the money so received from the assignee, subject to a deduction of the amount of the lien of the factor for his commissions and charges. Upon such state of facts, it is clear the right to recover was equally the result of the doctrine of Lord MANSFIELD as that of Lord ELLENBOROUGH. All the cases concede it to be the right of the principal to forbid payment to the agent, and to maintain an action himself against the buyer to recover the price of the goods; or to pursue his goods, or the notes taken for them, into the hands of third parties, precisely as if no *del credere* contract existed. And though such right in the principal would seem to consist only with a collateral undertaking by the agent, yet, in the contract *del credere*, being *sui generis*, it is held in no wise to change the original

and independent character of the agent's undertaking to his principal.

IN the case of *Swan v. Nesmith*, 7 Pick. 220, occurring a few years after the case in 3 Mason, the supreme court of Massachusetts decided that the legal effect of a commission *del credere* was to make the agent liable at all events for the proceeds of the sale, so that he might be charged in *indebitatus assumpsit*, as for goods sold to him. There the contract was admitted to be original and not collateral, and therefore not within the statute of frauds; and the necessary conclusion is, that the court intended fully to sanction the principle of *Grove v. Dubois*, to which, and the case of *Mackenzie v. Scott*, they refer for the definition of the nature of the commission *del credere*. And so in New York, the same principle is established, as will be seen by reference to *Wolf v. Koppel*, 5 Hill, 458, and same case on appeal, 2 Denio, 368, and *Sherwood v. Stone*, 14 N. Y. 267. The two last cases, being in the court of last resort, fully approve and adopt, as far as we can discover from the opinions delivered, the principle of the cases of *Grove v. Dubois*, and *Mackenzie v. Scott*. Judge STORY, however, in his work on Agency, section 215, adopting his own view of the law as found in *Thompson v. Perkins*, supported by *Morris v. Cleasby*, and the cases in the common pleas, says, that the true engagement of the agent *del credere* is merely to pay the debt, if it is not punctually discharged by the buyer. That, in legal effect, he warrants or guarantees the debt; and thus he stands more in the character of a surety for the debt, than as a debtor. And the principle is so stated in other American treatises. But, with all due deference to the high authority of Judge STORY, we think the decided weight of authority is against his position.

In England the question has been recently under discussion and re-examination, the result of which is quite at variance with the doctrine laid down in *Morris v. Cleasby*. In *Couturier v. Hastie*, 8 Exch. 39, the action was brought by the principal against his factor who, on commission *del credere*, had sold a cargo of corn, and the purchaser refusing to comply with the contract on insufficient grounds, and afterward becoming bankrupt, the question was whether the factor was liable for the non-fulfillment of the contract, by reason of his *del credere* commission, there being no guarantee in writing; and the court held the factor liable, not regarding the undertaking as one simply to pay the debt of another, within the 4th section of the statute of frauds; and the decision in *Wolf v.*

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Koppel, 5 Hill, 458, was referred to and adopted as containing sound law upon the subject. And in the more recent case of *Wickham v. Wickham*, 2 Kay & John. 478, Sir WM. PAGE WOOD, then the vice-chancellor, and at present the lord chancellor of England, in referring to the case of *Couturier v. Hastie*, as authority, said. "When I look at the whole of that case, and consider the reasons given by the judges in delivering their judgments, though given very cautiously and guardedly, I cannot but conclude that they considered that an agent entering into contract in the nature of a *del credere* agency, entered in effect into a new substantial agreement with the persons whose agency he undertook; that the agreement so entered into by him was not a simple guarantee, but a distinct and positive undertaking on his part, on which he would become primarily liable. Otherwise, I cannot see how the learned judges could arrive at the conclusion that the undertaking was not within the statute of frauds."

Supposing this to be the correct conclusion deducible from the present state of the authorities, of which we have no doubt, the contract being distinct and positive, rendering the agent primarily liable, it necessarily follows that the agent stands in no such relation to his principal as that of mere surety for the price of the goods sold. His relation to his principal is that of debtor as well as agent; and being so, the legal consequences of the debtor relation must follow. Indeed, it was conceded in the case of *Leverick v. Meigs*, 1 Cow. 645, where the liability of such an agent was attempted to be restricted, that if by the engagement the agent became a debtor absolutely, as if he were himself the purchaser, he would be bound for the remittance of the money, as well as for its payment by the buyer. "This arises from the general principle, that the debtor is bound to make payment to his creditor, and consequently, if he remits a bill which turns out of no avail, it is no payment. It does not discharge a precedent debt, unless it be so expressly agreed between the parties" (1 Salk. 124; 2 Johns. Cas. 441; *Glenn v. Smith*, 2 Gill & Johns. 493); or, unless the creditor parts with the bill, or is guilty of *laches*, to the prejudice of the debtor, in not presenting it for acceptance or payment in due time.

Of course, the agent, acting under a commission *del credere*, where the goods have been sold on an authorized credit, cannot be required to account to his principal before the expiration of the credit given to the buyer. And if the money which comes into his hands be

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remitted under special instruction from the principal, then it will be at the risk of the latter, provided the instructions are observed with proper caution and diligence on the part of the agent. But, in this case, it is not pretended that there were any special instructions in regard to the manner of remitting the money received by defendant. The remittance therefore was at his risk, as it would be of any other debtor remitting funds to discharge a debt due by him.

Such being our view in regard to the liability of the defendant as an agent, acting under a commission *del credere*, we are of opinion that there was error committed by the court below in refusing to grant the first prayer of the plaintiffs, which was intended to present the case as within the principle of *Grove v. Dubois* and *Mackenzie v. Scott*, and particularly the latter, to which this case bears a strong analogy.

But as it has been earnestly contended in argument that the contract *del credere* only extends to the payment of the price of the goods, and not to the remittance of the money to the principal, and the court below having so instructed the jury, let us examine the case briefly upon that supposition, in order to determine whether the defendant be not liable, as indorser of the gold draft transmitted to the plaintiff.

The defendants, upon collecting the amount due from Akers, placed the money in his own account with his bankers, and purchased of them the gold draft, that was afterward dishonored, by a check on his account. This draft he caused to be made payable to his own order, without reference to his character as agent, and after indorsing it to the plaintiffs, or their order, it was transmitted to them to pay, not only the price of the goods sold to Akers, but a balance due from the defendant himself. The draft proving worthless, and having been purchased without special directions, what is the liability of the defendant by reason of his unqualified indorsement?

Judge STORY, in his work on Agency, section 157, states the rule as an unqualified one, that an agent, though known as such, who indorses a bill or note generally, makes himself personally responsible; "for, in such a case, although he is a known agent, the making, or accepting, or indorsing of the instrument is treated as an admission that it is his personal act, not only in respect to third persons, but also in respect to his principal." And for this propo-

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sition, as stated, he cites many respectable authorities. So CHITTY, in his work on Bills, on page 46, states the same general principle, and says: "If a person employed by the plaintiff to purchase bills for him, obtain them payable to himself and indorses them generally, he will be liable upon that indorsement, even to his own employer, although he had no guarantee commission;" and the court, in deciding one of the cases referred to, observed that the defendant might have specially indorsed the bill *sans recours*, and not having thought fit to do so, he was personally liable. And for other authorities, supporting the same general proposition, see Smith on Mercantile Law, 164; Russell on Brokers and Factors, 263, 264; Parsons on Notes and Bills, 102.

Notwithstanding, however, the rule is thus generally and unqualifiedly stated, we think, on the more recent authorities, it is not to be applied, as between the principal and agent themselves, without some limitation. The indorsement, of course, if unqualified, is to be taken as importing *prima facie* liability on the part of the agent. He should be allowed to show, however, as matter of defense, that it was not the intention that he should be personally charged by his indorsement, and if there be no intention to create personal liability, none will exist as between himself and his principal. Whether such intention exists will, in all cases, depend upon the circumstances of the transaction. But, as was said by Mr. Chief Justice TILGHMAN, in *Mills v. O'Hara*, 1 Serg. & Rawle, 32, the circumstances should be *clear* and *strong*, to take off the presumption which arises from the indorsement. See the case of *Castrique v. Battigieg*, 10 E. F. Moore, 94, before the privy council.

Such being the law, the next question is, has the liability of the defendant been fixed by the proper evidence of due demand and notice?

No direct proof of demand and notice was offered at the trial. In the absence of such evidence, the liability was sought to be fixed by reason of the conduct and declarations of the defendant subsequently to the protest of the draft. The plaintiffs' second prayer enumerates the facts that were supposed to have fixed the defendant's responsibility as indorser; and whether they are sufficient for that purpose is the question to be decided.

If, in point of fact, there had been no demand and notice of dishonor, or insufficient demand and notice, we think this second prayer defective, because it does not submit to the jury to find

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whether the defendant was fully informed, at the time of the promise and other conduct relied on, of all the facts and circumstances of the neglect to make demand and to give the notice. The promise and other circumstances stated in this prayer would certainly be sufficient to charge the defendant as indorser, if he possessed full knowledge at the time. Without such knowledge, however, his promise or acknowledgment would not bind him. It is, therefore, essential, in this aspect of the case, that the fact of knowledge be found by the jury, in addition to the fact of the defendant's treating the debt as his own and promising to pay it to the plaintiffs. *Beck v. Thompson*, 4 H. & J. 531; 1 Parsons on Notes and Bills, 595, and the authorities there cited.

But if the party is sought to be charged on his indorsement, and his promise or assumption be used as evidence of the previous demand and notice, a different principle applies. In such case, any promise to pay, or admission made by the indorser that he continues liable, subsequent to the dishonor, is good evidence upon which to found a presumption that every thing has been properly done to render him liable. This is a principle now well established. As in the case of *Lundie v. Robertson*, 7 East, 231, which was an action by an indorsee against an indorser, and the only evidence of notice of dishonor being the promise of the defendant, Lord ELLENBOROUGH said: "When a man, against whom there is a demand, promises to pay it, for the necessary facilitating of business between man and man, every thing must be presumed against him. It was therefore to be presumed *prima facie*, from the promise so made, that the bill had been presented for payment in due time and dishonored, and that due notice had been given of it to the defendant." And so in the case of *Hicks v. Beaufort*, 4 Bing. (N. C.) 229, where the question was similar to that in *Lundie v. Robertson*, TINDALL, C. J., said: "The cases go on this point only; that if, after the dishonor of a bill, the drawer distinctly promises to pay, that is evidence from which it may be inferred he has received notice of the dishonor, because men are not prone to make admissions against themselves; and, therefore, when the drawer promises to pay, it is to be presumed he does so because the acceptor has refused."

This presumption, however, is one of fact for the jury, and not an absolute legal conclusion to be drawn by the court. It is *prima facie* only, and liable to be rebutted. 4 Bing. (N. C.) 229; *Booth v. Jacobs*, 3 Nev. & Man. 351; *Picken v. Graham*, 1 Cr. & Mee. 728;

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Brownwell v. Bonney, 1 Q. B. 39. If no demand had been made and notice given, the defendant would be entitled to prove the omission, and the further fact that his promise or acknowledgment had been made without knowledge of the plaintiffs' neglect in this respect, and thus rebut the presumption. The jury should be required to find from the evidence whether due demand and notice had occurred, as ground of the plaintiffs' right to recover. This being so, the plaintiffs' second prayer is also erroneous in not requiring due demand and notice to be found by the jury. Instead of making the right of recovery depend upon the legal conclusion to be drawn from the facts stated, the jury should have been instructed that it was competent to them, from the facts enumerated, if found to exist, to infer and conclude, as matter of fact, that due demand had been made and notice of dishonor given, and if they should so find, that then the plaintiffs were entitled to recover. It follows, therefore, that the plaintiffs' second prayer was properly rejected by the court below.

It results necessarily from what has been said that the defendant's first prayer was erroneous, and should not have been granted. It assumed that the contract resulting from the *del credere* commission was discharged in the payment of the money by Akers to the defendant. This, as we have seen, was an erroneous view of the law. It also follows, from what we have said in reference to the plaintiffs' second prayer, that the second prayer of the defendant should not have been granted. It assumed that the defendant could not be held liable, after the receipt of the money from Akers, either by virtue of the commission *del credere*, or his indorsement of the draft, if he used ordinary diligence in transmitting the money to the plaintiffs. This, as we have shown, is not maintainable. The judgment below will be reversed, and a new trial awarded.

Judgment reversed, and new trial awarded

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FIRST NATIONAL BANK OF PLYMOUTH, appellant v. PRICE *et al.*

(88 Md. 487.)

Enforcement of statutes of another State—penalties.

The provisions of a statute of Pennsylvania limited the amount of the debts and liabilities (not including capital stock) of certain companies to the amount of their capital actually paid in, and further provided that "if any debts or liabilities shall be contracted exceeding the said amount, the directors and officers contracting the same, or assenting thereto, shall be jointly and severally liable, in their individual capacities, for the whole amount of such excess, and the same may be recovered by action of debt as in other cases." In an action to recover for a violation of this statute—*held*, that the liability so created was in the nature of a penalty, and was not enforceable by action outside of the State which enacted the law.

ACTION of debt under a statute of the State of Pennsylvania. The facts appear in the opinion of the court.

William S. Waters and *Geo. W. Woodward*, for appellant, argued that the liability of the company arose from the contract, and was not in the nature of a penalty. *Morgan v. N. Y. & A. R. R. Co.*, 10 Paige, 290; *Ang. & Am. on Corp.* §§ 579–611; *Corning v. McCullough*, 1 Com. 66, 71; *Ex parte Van Riper*, 20 Wend. 616; *Van Hook v. Whitlock*, 3 Paige, 415; *Allen v. Sewell*, 2 Wend. 339; *Marsh v. Clark*, 17 Mass. 334. The liability of the individual members of the company exist at common law only so far as the law restricts it. *Bayler v. Bancker*, 3 Hill. 189, and cases before.

John Carson and *John Stewart*, for appellee.

BARTOL, C. J. This suit was instituted by the appellant against the appellees, as officers and directors of "The Consumers' Union Coal Company," a corporation created under the laws of the State of Pennsylvania.

The case comes before us upon general demurrer to the declaration, and the only question to be decided is, whether the liability for the debts of the corporation imposed upon the officers and directors by the law of Pennsylvania of March 30, 1860, can be enforced by an action of debt in this State?

The provisions of the statute, which are substantially set out in the declaration, are as follows:

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“In order the better to limit and restrict the amount of liabilities to the actual capital of all companies formed under the act, to enable joint tenants, tenants in common and adjoining owners of mineral lands in this commonwealth to manage and develop the same, approved the 21st day of April, 1854, and to provide for the protection of both the creditors and stockholders thereof, the total amount of the debts and liabilities (other than its capital stock) of any such company shall never exceed the amount of its capital actually paid in; and if any debts or liabilities shall be contracted exceeding the said amount, the directors and officers contracting the same or assenting thereto shall be jointly and severally liable, in their individual capacities, for the whole amount of such excess, and the same may be recovered by action of debt as in other cases.”

It is alleged in the declaration that the indebtedness of the corporation to the appellant was, at the time the same was contracted, “in excess of the capital stock actually paid in, and that the defendants were then directors and officers of the corporation, and assented to the contracting of said debts.”

The case stated comes within the provisions of the statute, and if this suit had been instituted in Pennsylvania there could be no doubt of the right of the plaintiff to recover. But the question here is, can the liability imposed by the statute be enforced out of the limits of Pennsylvania? This depends upon the nature of the liability and the manner in which it is created. Does it arise upon contract, or is it in the nature of a penalty created by the statute, and imposed upon the defendants as wrong-doers?

The decision of the case turns upon the proper solution of these questions; for, while a contract made in one State is enforced in other States agreeably to the law of the State where it is made, it is well settled that no State will enforce penalties imposed by the laws of other States; such laws are universally considered as having no extraterritorial operation or effect.

These general principles were conceded in the argument, and we need not cite authorities in their support.

To ascertain the nature of the responsibility here sought to be enforced, and to determine whether it arises upon contract or is one imposed by the statute by way of penalty, we must at last refer to the provision of the statute itself and ascertain its true construction and effect.

Before doing this we will refer to some of the cases cited in

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argument, in which the courts of other States have considered the nature of the liability of stockholders and officers of corporations growing out of statutory provisions similar to the one before us.

It has been decided by the courts of New York in several cases, and seems now to be there well settled, that, where by a statute it is provided that the individual corporators shall be jointly and severally liable for the debts of the corporation, such liability is not in the nature of a penalty, but may be enforced as a contract. *Corning v. McCullough*, 1 Coms. 47; *Allen v. Sewall*, 2 Wend. 338; *Moss v. Oakley*, 2 Hill, 265; *Bailey v. Bancker*, 3 id. 188; *Hager v. McCullough*, 2 Denio, 119; other cases might be cited to the same effect.

In *Ex parte Van Riper*, 20 Wend. 614, it was held that such a liability, arising under an act of incorporation of the State of New Jersey, might be enforced, by a suit, in the State of New York.

The ground upon which those decisions rest, as succinctly stated by Judge BRONSON in *Corning v. McCullough*, is, that in such cases "the stockholders stand substantially upon the same footing as though they had been partners, or an unincorporated association; that they were answerable to the creditors of the company, as original and principal debtors, though the creditors were first to exhaust their remedy against the corporation."

These cases have been relied on by the appellant, in argument, as analogous to this, and it is contended that the liability of the defendants in this suit is of the same kind.

On the other hand, it has been contended by the appellee's counsel that the liability imposed by the Pennsylvania statute, now under consideration, and which is here sought to be enforced, is not an original responsibility for the debts of the corporation *eo nomine*, but is one imposed by the statute for a violation of its provisions, or a breach of duty on the part of the directors, in contracting debts of the corporation "exceeding the amount of its capital actually paid in." The liability is "*for the amount of such excess*," and therefore it is contended that it springs, not out of the contract of the parties, but is in the nature of a penalty imposed by the statute.

In support of this view we have been referred to a number of cases, in which it has been held that where a statute enjoins a duty to be performed by the officers of a corporation, and in case of a failure on their part to perform such duty, makes them individually

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liable for the debts of the corporation, such liability is in the nature of a penalty.

To this class of cases belong *Garrison v. Howe*, 17 N. Y. 458; *Andrews v. Murray*, 33 Barb. 354; *Shaler and Hall Quarry Co. v. Bliss*, 34 id. 309; *Boughton v. Otis*, 21 N. Y. 261; *Squire v. Brown*, 22 How. Pr. 45; *Halsey v. McLean*, 12 Allen, 438; *Lawler v. Burt*, 7 Ohio St. 341; *Derrickson v. Smith*, 3 Dutch. 166; *The Harrisburg Bank v. Commonwealth*, 26 Penn. 451.

In *Halsey v. McLean* and *Derrickson v. Smith*, it was held that in such cases the liability can only be enforced in the State enacting the statute.

In each of these cases the suit was brought against the trustees of a manufacturing corporation created under the law of New York, which required the corporation to make and publish a report at a certain time, annually, signed and verified as prescribed, stating the amount of its capital and of the proportion actually paid in, and the amount of its existing debts; and enacted, that "if any of said companies shall fail so to do, all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing, and for all that shall be contracted before such report shall be made."

In construing the statute, the supreme courts of Massachusetts and New Jersey decided that the liability of the trustees was in the nature of a penalty imposed on them for a violation of official duty, and could not be enforced out of the limits of New York.

The counsel for the appellant in their argument endeavored to distinguish the cases of *Halsey v. McLean* and *Derrickson v. Smith*, from the case before us, upon the ground that, under the New York statute, the liability of the trustees was not contemporaneous with the creation of the debts; but arose from a subsequent breach or failure of duty on their part.

This is true so far as regards the existing debts of the corporation created before the failure to make the report. But the statute makes them liable in the same way for any debts they may contract after the failure to report, and before such report shall be made; it is clear that under this last provision the liability of the trustees would arise at the time of creating the debts; and yet in the cases no distinction is made as to the nature of the liability under the statute for existing debts, and for such as might be contracted after the breach of duty had been committed.

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It is manifest that the responsibility imposed by the statute upon the trustees is of the same kind for both classes of debts; and that it arises not out of the contract by which the debts are created, but from matters entirely collateral thereto, and resting entirely on the provisions of the statute.

In *Lawler v. Burt*, 7 Ohio, 341, the suit was by a creditor of the corporation against the individual stockholders to enforce a liability, which arose as follows:

By a statute of March, 1839, it was enacted that every corporation, except an incorporated bank, that shall issue notes designed to circulate as money, shall be deemed an unauthorized bank, within the meaning of the act of January 27, 1816.

By the 11th section of the act of January 27, 1816, it was enacted that every stockholder, shareholder or partner, hereafter interested in any such bank, shall be jointly and severally answerable in their individual capacity for the whole amount of the bills, bonds, notes and contracts of such bank, etc.

By the 12th section the holder of the notes was authorized to institute suit and recover judgment thereon against any part or the whole of the persons who were interested in such bank at the date of such notes, etc.

The case came within these provisions and the plaintiff sued as holder of the notes. The defendants plead the statute of limitations, and the question before the court was, whether the case fell within those provisions of the statute relating to actions upon contracts, or those which limited the time for suits to recover penalties and forfeitures. It was decided that the liability was in the nature of a penalty and did not arise upon contract. That case was in principle very analogous to the case before us. There it was argued that the individual responsibility of the defendants upon the notes existed under the statute at the time of their issue, and that they were bound in the same manner as if they had been the makers of the notes. But that argument did not prevail, the court held that the liability under the statute was for a *tort* and not in contract.

The case of *Kritzer v. Woodson*, 19 Missouri, involved the question of the nature of the liability of directors of a corporation, under a statutory provision, exactly like the one before us. The statute declared "that the whole amount of debts of any corporation, except banking companies, shall not exceed the amount of its capital stock actually paid in, and in case of any excess, the directors,

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under whose administration it shall happen, shall be jointly and severally liable, to the extent of such excess, for all the debts of the company then existing, and for all that shall be contracted, so long as they shall respectively continue in office, and until the debts shall be reduced to the said amount of the capital stock."

The suit was against the directors to recover the excess, and the court decided that the liability imposed by the statute was in the nature of a penalty. The question arose, as in *Lawler v. Burt*, under the plea of the statute of limitations, and was decided in the same way. That decision, as it was made upon a statute in the same terms as the one now under consideration, is directly in point, and, so far as it may be taken as authority, supports the position of the appellees in this case.

We will conclude our reference to decided cases by citing the decision of the supreme court of Pennsylvania in *Hill v. Frazier*, 22 Penn. 320. That being the ruling by the court of last resort in the State in which the statute before us was enacted, upon the construction of a statutory provision somewhat analogous, is entitled to great weight in determining the present case.

There the suit was brought against a director of a manufacturing company to recover a debt due by the company.

By section 14 of the act of April 7, 1849, it was provided that "dividends of so much of the profits of any such company as shall appear advisable to the directors shall be declared in the months of June and December annually, and paid to the stockholders or their legal representatives, at any time after the expiration of ten days from the time of declaring the same; but the dividends shall in no case exceed the amount of the net profits actually acquired by the company, so that the capital stock shall never be impaired thereby, and if any dividend shall be declared and paid which shall impair the capital stock of said company, the directors consenting thereto shall be jointly and severally liable, in their individual capacities, for all the debts of the company then existing, and all that shall thereafter be contracted so long as they respectively continue in office." (Then follows a proviso not material to be noticed.) Purdon's Digest, 692, 693.

In *Hill v. Frazier* the question of the nature of the liability of a director under this statute was considered. The plaintiff was a creditor of the company, and had assigned his claim to Eldred, for whose use the suit was instituted. It was contended on the part of

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the defense that, being for a penalty, the claim was not assignable; to this it was answered by the court (page 324), "that we see nothing in the nature of the claim itself which prevented the holder from assigning it. It was not, as the defendant insists, a mere penalty. It was a debt due from the company to Frazier, which he might transfer like any other debt, and the assignee was entitled to all the remedies for its recovery which the original creditor would have had." This point involved the right of the assignee, and it was decided that the thing assigned was not a mere penalty, but a debt of the company, in its nature assignable.

In the same case a question arose as to the competency of the stockholders as witnesses for the plaintiff, and in disposing of that question the court considered the nature of the defendant's liability, and decided that they were incompetent, because, by a recovery against the defendant, "they would be forever clear of it." "The defendant," says the court, "has no right of subrogation. He is sued as a wrong-doer, and wrong-doers have no recourse over against those in *pari delicto*, or against any body else." (Page 323.)

That decision conclusively shows that the court, in construing the statute before them, held that the liability of the director was not one arising upon contract, but one imposed upon him by the statute as a wrong-doer, and, therefore, in the nature of a penalty.

When we examine the provision of the statute now under consideration we are struck with the very close analogy between it and the law construed in *Hill v. Frazier*; there the liability of the director arose from his consenting to the declaring of a dividend exceeding the amount of the net profits actually acquired by the company; here the liability arises from consenting to contract debts exceeding the amount of the capital stock actually paid in. In each case the liability is one created entirely by the statute and imposed on the directors as wrong-doers.

It appears in the report of *Hill v. Frazier* that the debts of the company there sued on were contracted after the unlawful dividend had been declared; and therefore the liability of the defendant under the statute accrued at the time the debts were contracted. The case is in many respects very analogous to this, and we think is a strong authority in support of the conclusion we have reached as to the true construction of the statute of March 30, 1860. By what law the directors are forbidden to contract debts of the corporation exceeding the amount of its capital stock actually paid in,

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and if they do so they are made liable individually for the excess. This liability does not arise upon any contract to which the directors are parties, but is altogether statutory, imposed on them as wrong-doers, and in its nature penal, and, as such, can only be enforced within the State where the statute operates.

In our opinion the judgment of the court below is correct and ought to be affirmed.

Judgment affirmed.

LESTER AND WIFE, appellants, v. HOWARD BANK.

(23 Md. 553.)

Enforcement of contracts prohibited by statute — Violation of bank charter.

A banking corporation was instituted under a statute which provided that no director or other officer of the bank should borrow any money from the bank, under penalty of fine and imprisonment. The president of the bank, who was also a director, borrowed a large sum of money from the bank, and afterward made an assignment of his property for the benefit of his creditors, and, on an appeal from an order allowing the claim of the bank under the loan, *held*, that the contract arising from the loan was enforceable, though prohibited by statute, and that the lien of the bank on property in the hands of the assignee was good to the extent of the loan.

APPEAL from an allowance of the claims of a bank on an insolvent debtor's estate, under a loan prohibited by statute. The facts are set forth in the opinion of the court.

Orville Horwitz and *Benjamin C. Barroll*, for appellants, argued that the loan, having been made in violation of its charter, was not enforceable by either party. *Albert v. Mayor and City Council*, 2 Md. 159; *Bayne v. Suit*, 1 id. 85; *Merrick v. The Trustees of the Bank of the Metropolis*, 8 Gill. 64; *Hall v. Mullin*, 5 H. & J. 190; *Cannan v. Bryce*, 3 B. & Ald. 179; *McKinnell v. Robinson*, 3 Mee. & Wels. 441; *Pearce v. Brooks*, Law Rep. 1 Exch. 217; *Joy v. Campbell*, 1 Sch. & Lef. 339; *Evans v. Richardson*, 3 Merrivale, 470; *Leavitt v. Palmer*, 3 Comst. 19.

Edward Duffy and *Henry Stockbridge*, for appellees.

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ROBINSON, J. The rule of law is well settled that no action will lie to enforce a contract *malum in se*, nor, if executed, to recover money paid under it. In all such cases the maxims "*ex turpi causa non oritur actio*" and "*in pari delicto potior est conditio defendentis et possidentis*" apply.

In regard to contracts not *immoral* or *criminal* in themselves, but prohibited by statutory law, the same general rule may be said to apply, not, however, universal in its application, but subject to certain exceptions as binding in authority as the rule itself. Public policy, it must be borne in mind, lies at the basis of the law in regard to illegal contracts, and the rule is adopted, not for the benefit of parties, but of the public. It is evident, therefore, that cases may arise even under contracts of this character, in which the public interests will be better promoted by granting than by denying relief, and in such the general rule must yield to this policy. Hence Judge STORY admits that, even between parties "*in pari delicto*," relief will sometimes be granted if public policy demands it. 1 Story's Eq. Jur., §§ 298-300.

Other cases are to be found arising under contracts made in violation of a statute, in the application to which of the general rule, courts have been governed by the plain and obvious purposes of the law; and in such it has been repeatedly held that an action would lie against a party receiving money under such a contract upon a promise implied by law to refund it.

Thus in *Smith v. Bromley*, Doug. 697, *note*, Lord MANSFIELD said: "If the act is in itself immoral, or a violation of the general laws of public policy, there the party paying shall not have this action. * * * But there are other laws which are calculated for the protection of the subject against oppression, extortion, deceit, etc. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover."

This was followed by *Jacques v. Golightly*, 2 W. Black. 1073, where an action was brought to recover money paid to the defendant as a premium for issuing lottery tickets, in contravention of the statute 14 Geo. III, ch. 76, and in which it was insisted that the plaintiff being *particeps criminis* was not entitled to recover, but BLACKSTONE, J., overruled the objection, and gave judgment for the plaintiff. The same principle was affirmed in *Browning v. Morris*, 2 Cowp. 790, in which Lord MANSFIELD says: "It is very material

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that the statute itself, by the distinction it makes, has *marked* the *criminal*, for the penalties are all on *one* side—upon the office keeper.” And in *Williams v. Hedley*, 8 East, 378, where an action was brought to recover money which had been paid by the plaintiff to the defendant to compromise a *qui tam* action brought by the defendant against the plaintiff, contrary to the provisions of a certain statute, it was held that the principle in *pari delicto* did not apply, because it was the purpose of the statute to punish the party who sues in order to extort money, and not the person who might be the victim of such extortion. This appears, said Lord ELLENBOROUGH, “to have been the *true sense and intention* of the legislature.”

Whether the action was maintained in these cases upon the ground that the principle of “*pari delicto*” did not apply, because the contracts were prohibited by statutes passed for the purpose of preventing one set of men from taking advantage of the necessities of others, or upon the broader ground taken in some of the American cases, that the statutes designated the criminal by prescribing punishment against one party to the contract only, is, in our view, and for the purposes for which they are referred to, quite immaterial. They prove conclusively that one common consequence does not attach to every contract made in violation of positive law, and further than this, that, in determining the question as to whether the maxim of *pari delicto* will operate as a bar to relief, courts will look to the statute itself—the object and purposes for which it was passed—in order to ascertain, in the language of Lord ELLENBOROUGH, “the true sense and intention of the legislature.”

And accordingly in *Harris v. Runnels*, 12 How. 80, the supreme court, while acknowledging, as a general rule, that contracts made in contravention of statutory law are void, admit that the rule is subject to many exceptions, made upon distinctions very difficult to be understood consistently with the rule “so much so,” say the court, “that we have concluded before the rule can be applied in any case of a statute prohibiting or enjoining things to be done, with a prohibition and a penalty only for doing a thing which it forbids, that the statute must be examined as a whole to find out whether or not the makers of it meant that a contract in contravention of it should be void, or that it was not so to be. In other words, whatever may be the structure of the statute in respect to prohibition and penalty, or penalty alone, that it is not to be taken

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as granted that the legislature meant that contracts in contravention of it were to be void, in the sense that they were not to be enforced in a court of justice. In this way the principle of the rule is admitted without at all lessening its force, though its absolute and unconditional application to every case is denied." The court further add: "That when the statute is silent, and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void."

Under the rule thus laid down, which we regard as just and reasonable, the rights and remedies of parties growing out of prohibited contracts are to be determined by the construction of the statute itself according to the well-established rules of interpretation, and if it shall appear that it was not the intention of the legislature to declare the contract void, although made against the prohibition, this *intention* will be gratified, even if it should contravene some general rule of law.

With this rule to guide us, let us look at the facts in this case. The Howard Bank, it appears, on the 4th day of October, 1864, agreed to sell to James F. Purvis, its then president and one of its directors, certain property situate in the city of Baltimore, for the sum of \$28,000, and, on the 12th day of July, 1866, Purvis borrowed of the bank the sum of \$25,000, the said sum to be expended in building houses and otherwise improving the property. On the day of the loan, Purvis executed a paper by which he agreed to make the payment of said sum a lien on the property, and further, that he would not demand a conveyance of the *legal title* until the \$25,000, in addition to the \$28,000 due as purchase-money, were fully paid.

Afterward Purvis made an assignment of all his property, for the benefit of his creditors, to Orville Horwitz, Esq., who, on the 1st day of July, 1867, filed a bill against the bank holding the legal title, setting forth the above agreements, and praying for a sale of the property in question. Without waiving any of their rights, an agreement was entered into by all the parties that the property should be sold and the fund take its place, and the proceeds of sale being in a court of equity for distribution, an account is stated, in which the auditor, after allowing the bank its original claim of \$28,000 on account of unpaid purchase-money, applies the balance to the payment, first, of the loan of \$25,000, and the surplus to Mrs. Lester.

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To this account the assignee of Purvis, and Lester and wife have excepted, on the ground that the loan to Purvis and the agreement made to secure the payment of the same were *illegal* and *void*, Purvis being at the time an officer and director of the bank, and the following prohibition in its charter is relied on in support of this exception: "That this act is passed on the condition * * * that no director or other officer of said corporation shall borrow any money from said corporation; and if any director, etc., shall be convicted, etc., of directly or indirectly violating this section, he shall be punished by fine and imprisonment." The construction thus contended for amounts to this, the directors and officers may combine, and, in violation of the express provisions of the charter, and in utter disregard of the duties of their trust, loan to each other the entire assets of the bank, and then in a suit brought against them by their successors in office, representing innocent stockholders and creditors, set up this betrayal of their trust and violation of law as a defense to the action. Not that the section relied on so declares in express terms, or that it ever entered the minds of the legislature that such a construction could be put upon it, but because of some general rule of law which says that illegal contracts cannot be enforced.

Now if the section in question had further provided that nothing therein contained should exempt a director or officer from liability on account of such loan, we take it for granted, that no one would question the power of a court to enforce it. So, on the other hand, if we are satisfied that such was the intention of the legislature, upon a fair construction of the section according to the well-settled rules of interpretation, it must be gratified and have the same operation and effect as if it had been declared in express terms. What then was the purpose of the law when it declared that no director or officer should borrow of the bank? and "if any director," etc., "shall be convicted," etc., "of directly or indirectly violating this section he shall be punished by fine and imprisonment." We say to protect the stockholders, depositors and creditors of the bank, against the temptation to which the directors and officers might be exposed, and the power which as such they must necessarily possess in the control and management of the bank, and the legislature, unwilling to rely upon the implied understanding that in assuming this relation they would not acquire any interest hostile or adverse to the most exact and faithful discharge of duty,

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declared in express terms that they should not borrow, etc., of the bank. If, however, the views of the appellants be correct, this section, instead of being a security to the stockholders and creditors, becomes the instrument of their ruin, and instead of operating as a restraint upon the directors, it exposes them to the greatest of temptations, by relieving them from all responsibility, save the uncertainty of a criminal prosecution. To this construction of a statute, the object and purposes of which to our minds are plain, and which by its very terms *marks the criminal*, we cannot assent. We are of opinion, therefore, that the bank acquired a lien upon this property by the agreement of the 12th of July, and that this lien attaches upon the proceeds of sale in the hands of the assignee.

The principles which underlie our decision in this case are not in conflict with cases heretofore decided by this court and relied on by the appellants. In many of them, it is true, the general rule of law denying relief under illegal contracts is stated very broadly, but it will be found, upon an examination, that the construction of the several statutes under consideration did not justify the court in exempting contracts under them from the operation of the general rule.

In *Albert and Wife v. Savings Bank et al.*, 2 Md. 160, it was said that a loan to a director could not be recovered, but the suit was brought to recover certain stock belonging to a *cestui que trust*, which the trustee had pledged to secure a loan made to a firm of which he was a member. The court held that the loan being in violation of the charter of the bank, if any injury accrued to a third party from its acts, it ought to be held liable. "What the trustee did," say the court, "was a wrong on the rights of the appellants, and if the bank, in contempt of the limitation imposed upon it by its charter, aided him in the perpetration of the fraud, there is no reason either of public policy or in law which should exempt it from responsibility for the injury occasioned by its coöperation." But in this case the court admit that the trustee who had borrowed the money might be estopped from denying the legality of the transaction. It cannot be said, therefore, that the precise question now before us was decided in that case.

The exceptions on the part of Lester and wife stand on no better footing. It is true she agreed to purchase of Purvis one-half interest in the property for the sum of \$14,000, and that this agreement was prior to the loan; but no part of the purchase-money was paid

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by her, and, although there is some conflict in the testimony, we think it entirely fails to prove notice, on the part of the bank, of this alleged sale. Moreover, by the agreement of the 13th of April, 1866, Lester and wife acknowledge that Purvis had expended large sums of money in improving the property, by the erection of houses thereon and otherwise, and expressly empower him “to *sell and dispose of the property* so improved,” in order to re-imburse himself, etc. The loan to Purvis was subsequent to this agreement, and the money thereby obtained, we are satisfied, was expended by him in pursuance and according to the terms of said agreement. We see no reason, therefore, why the proceeds of sale, after the payment of the \$28,000 unpaid purchase-money, should not be applied to the payment of the loan of \$25,000, to secure which the property was specifically pledged by Purvis.

For these reasons, we think the order below ought to be affirmed.

Order affirmed.

CASES
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

**THE MANHATTAN LIFE INSURANCE Co., plaintiffs in error, v
WARWICK.**

(20 Gratton, 614.)

Life insurance — construction of policy — effect of war on — waiver by company of condition in policy

In July, 1857, W., a resident of Virginia, procured from the defendants an insurance upon the life of S., his debtor. The defendants were an insurance company organized under the laws of New York, and the insurance was effected through their agent in Richmond. The policy provided that the risk should determine if the premium was not paid when due; also, that no payments of premiums should be binding on the company unless the same was acknowledged by a printed receipt, signed by an officer of the company. The premiums were paid to the agent, and receipts given, signed by an officer until July, 1861, when the premium was paid, but only the receipt of the agent given. In July, 1862, the premium was tendered when due, to the agent, who refused to receive it, on the ground that the company had directed him that the premiums must be paid in New York. S. dying shortly after, this action was brought on the policy. *Held*, that the breaking out of the war did not annul the contract between the parties, nor revoke the authority of the agent; that the company had no power to require payment of premiums to be made in New York; that by neglecting to supply their agent with printed receipts, signed by an officer, the company had waived the provision in the policy making such receipts evidence of payment: and that, therefore, the company were liable for the amount of the insurance, less the last premium, which had not been paid.

THIS was an action on a policy of insurance issued by the Manhattan Life Insurance Co. of New York, bearing date the 23d of July, 1857, whereby the said company in consideration of the annual sum of \$1,031, paid by C. Warwick, insured the life of Wm.

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S. Warwick of Powhattan county, Virginia, in the sum of \$10,000, for the sole use of C. Warwick. Wm. S. Warwick was brother of and largely indebted to C. Warwick. The insurance was effected through J. B. Macmurdo, the company's agent in Richmond, Virginia.

The policy contained the following among other conditions:

"In case the said Corbin Warwick shall not pay the said premiums on or before the day hereinbefore mentioned for the payment thereof, and in every such case, the said company shall not be liable for the payment of the sum assured, or any part thereof; and this policy shall cease and determine."

"And it is further agreed by the assured, that, in case when this policy shall cease or become or be null or void, all previous payments made thereon shall be forfeited to the said company." "Not binding on the company until countersigned by J. B. Macmurdo, Richmond, and the advance premium paid."

On the back of this policy was indorsed, "no payment of premiums binding on the company unless the same is acknowledged by a printed receipt, signed by an officer of the company."

The premiums were punctually paid to the agent at Richmond, Macmurdo, and printed receipts given, signed by the secretary of the company, until July 23, 1861. The premium for that year with the exchange on New York was paid to the same agent, but only the receipt of the agent was given, he stating that he had no printed blanks but that he would send on the money and get the receipt. He wrote to the company stating that the premium had been paid, and asking for the receipt. The letter was received by the company but no receipt was sent. The amount of the premium was not received by the company, it having been confiscated by the confederate government.

When the premium for July, 1862, became due, Warwick called on Macmurdo and offered to pay it, with the amount of exchange on New York, but Macmurdo declined to receive it, stating that the company required the premiums to be paid in New York, and that they had instructed him not to receive money or to renew policies or continue them.

Wm. S. Warwick, the person whose life was insured, died in November, 1862.

Judgment was rendered for the plaintiff, Warwick, for the sum

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of \$8,969, being the amount of the policy less the premium not paid. From this judgment the defendants appealed.

Steger, for appellants.

Lyons, Maury & Howard, for appellee.

ANDERSON, J. The case presented by the record is this in brief: The company refused to receive the last premium when it fell due and was tendered, and now refuse to pay the policy because the premium was not paid; and, moreover, claim of the defendant in error a forfeiture of the premiums which he had paid, amounting to \$5,155, besides interest; and they invoke the intervention of this court to sustain them in these pretensions. If this was the contract, fairly interpreted according to its legal effect, however harsh in its operation upon the defendant in error, it must be carried out.

The first question, therefore, which we have to consider is, What was the *contract* between these parties? Without incumbering this opinion with a minute and critical examination of the policy, I will simply state what, in my opinion, the contract is, according to the legal import and effect of the policy. It is a contract of the company by deed poll, to pay to Corbin Warwick, for his sole use, ninety days after due notice and satisfactory evidence of the death of Wm. Sidney Warwick, \$10,000, for the consideration of \$1,031 in hand, paid by the said Corbin, and a like sum of \$1,031, to be paid by him annually, on the 23d of July, "for the term of the natural life of the said Wm. S. Warwick;" subject to defeasance upon the non-performance of various conditions minutely detailed; among others, the non-payment of the premiums, or either of them, on the day they fall due; in which case the company is not to be liable for the sum assured, or any part thereof; but the policy shall cease and determine. And it is further stipulated that, in every case where the policy shall cease or become void, all previous payments thereon shall be forfeited to the company.

The policy is one entire contract, not from year to year as premiums shall be paid, but for the whole term of the life of Wm. S. Warwick, upon condition that, if the annual premium is not paid on the 23d of July, the policy shall cease and be void: as was held in *Ruse v. Mutual Benefit Life Insurance Co.*, 26 Barb. 556, upon the construction of the policy in that case, the terms of which

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are very much the same as in this. That case, and also the case of *Hodsdon, adm'x, v. Guardian Life Insurance Co.* 1 Big. 219, 97 Mass. 144, fully sustain this construction. It is not a contract of indemnity, as a policy against fire, for a definite period, but it is a contract to pay a certain sum of money, for the consideration mentioned, upon the happening of an event which is inevitable, and only uncertain as to the time it may transpire.

It is a corollary from the contract, thus understood, that the company, when they executed this deed, assumed an obligation to pay the sum assured to Corbin Warwick, from which they could not be relieved by any thing they could *do* or leave *undone*, but only by the act or omission of the assured. Consequently, the company could not relieve itself from this obligation, or subject the other party to a forfeiture, by refusing to receive payment of a premium, or by hindering or preventing the other party from paying it, or by any disability on its part to receive it, and which prevented the payment, which was not provided for in the contract. If the assured was at the place on the day, where and when payment was to be made, and where he had a right to make payment, ready and prepared to make payment, but was prevented by either of the causes mentioned, it would be unreasonable to say that he had incurred the forfeiture. And I think it is equally clear, upon reason and authority, that the company was not thereby released from its obligation to pay the sum assured. It would be a monstrous perversion of law, and repugnant to our every sense of justice, to say that this company, after having received more than half the sum assured, could by this act determine the policy, hold on to the money they had received, and to say to their confiding victim, "you may whistle to the winds for your merited reward, notwithstanding you relied upon our covenant and good faith to pay it."

And, although the case cannot be so strongly put, I think it is equally clear that, when the assured was involved in no default, but was at the place when and where payment was to be made, ready and willing to pay, but was prevented by the disability of the company to receive payment, from whatever cause, he having had no agency in producing it, the company is not entitled to claim the forfeiture, or to be relieved from its obligation to pay the sum assured.

The question upon this view of the case is suggested, was the assured, on the 23d of July, 1861 and 1862, at the place where the

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premiums were payable, ready and prepared and offering to pay them? He was at the office of the agent, J. B. Macmurdo, in the city of Richmond, and then and there offered to pay the premiums which fell due on those days respectively, in the kind of funds which the company required. On the first of those days, Macmurdo received payment in New York funds, or its equivalent, in discharge of the obligation, and gave his receipt therefor, as agent of the company. On the last day mentioned, the assured offered to pay Macmurdo, the agent, but he refused to receive it, upon the ground, as he alleged, that he was instructed by the company not to receive payment, "nor to renew or continue policies." Now, upon this contract the questions arise, first, was the city of Richmond or the city of New York the place of payment? and, secondly, was Macmurdo the agent, or an officer in New York the agent, to whom payment was to be made?

I think when this contract is interpreted in reference to its terms and subject-matter, the situation, character and legal status of the parties; the act of assembly of Virginia, under authority of which it was made, and which must be read as a constituent part of it; and with reference to the usage of the company, and the conduct of the parties in the execution, it must be regarded as a Virginia contract, made in Virginia, with the Virginia agent; and to be performed in Virginia through that agent, and that it was intended by the parties, and so understood by them, that the payment of the premiums were to be made to the agent at Richmond; and if made or tendered to him at the time they respectively fell due, it would be a fulfillment of the condition required of the assured. To take a comprehensive view of the whole case, I cannot come to a different conclusion.

The defendant in error and Wm. S. Warwick were resident citizens of Virginia, and the plaintiff in error a corporation of the State of New York. It was created by a law of that State, and cannot exist outside of its limits. It had no power to make contracts or to do business in Virginia, but by permission of the State. In *Paul v. Virginia*, 8 Wall. 168, Mr. Justice FIELD, delivering the opinion of the supreme court, says: "Having no absolute right of recognition in other States, but depending, for such recognition, and the enforcement of its contracts, upon their assent. it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose.

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They may exclude the foreign corporation entirely; they may restrict its business to particular localities; or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." Again, on p. 183, he says: "The policies do not take effect, are not executed contracts, until delivered to the agent in Virginia. They are, then, *local* transactions and governed by local laws." In *Slaughter's Case*, 13 Gratt. 767, SAMUEL, J., says: "I have no doubt of the power of the general assembly of Virginia to forbid foreign corporations from engaging in any pursuit within the State; and of consequence to grant permission to engage therein only upon terms."

The legislature of Virginia, consistently with this well-established principle, enacted a law with regard to foreign corporations. Chapter 39, section 23, of Code of 1860, provides, "that no insurance company, unless incorporated by the legislature of this commonwealth, shall make any contracts of insurance within this State until such insurance company shall have complied with the provisions of this act."

The 24th section provides, "that every such insurance company shall, by a written power of attorney, appoint some citizen of the commonwealth resident therein its agent or attorney." This is the first provision. And no foreign insurance corporation could make a contract in this State until such agent was appointed. But it imposes this further condition, that such agent shall accept service of process, etc., in these words: "Who shall accept service of all lawful processes against such company in this commonwealth, and cause an appearance to be entered in any action, in like manner as if such company had existed and been duly served with process in this State." And the 27th section provides, that service of such process on such attorney shall be "sufficient service upon his principal." These provisions of the act are not words of limitation on the power of the agent, but of enlargement. The first provision requiring them to appoint an agent here is *general*, and implies, it seems to me, that the company, in all its transactions in this State, must act through that agent, and can act in no other way. It is only known and recognized in this State through that agent. It implies that the company can only make contracts through him, and receive and enforce their performance through him. He is the sole representative of the company in this State. The term implies

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a general agency, limited only to the transactions of the company in this State; but would not embrace, I apprehend, by that general term, the power to accept the service of legal process, and to enter an appearance for the company when sued, if it had not been so expressed. The right of action or suit against the company in the Virginia courts, without some such express provision, would not have been required merely by providing that they should appoint a resident citizen of this commonwealth their "general agent" here. But this provision gives to the company a sort of local existence in this State, through their representative agent, and shows a purpose and design, on the part of the legislature, to make its transactions within this State local, and subject to the jurisdiction of the State, as effectually as if it had been incorporated in this commonwealth. The 25th section requires the company to file a copy of the power of attorney, duly certified and authenticated, with the auditor of public accounts, etc.

The 26th section requires the company to have an agent here at all times, without interruption, "while any liability remains outstanding on such insurance." The 28th section imposes penalties upon the agent who shall effect policies of insurance in this State without complying with the requisitions of the act. I think, therefore, that the construction given to this act, that it only contemplates and provides for the service of legal process and the prosecution of suits against the company in this State, is too restrictive. This more clearly appears from subsequent sections. The 29th section requires the agent to make return, on oath, to the auditor of public accounts, on the first Monday of October and May in every year, "of the amount of premiums received and assessments collected during the said period." And also that he "shall, at the same time, pay into the treasury such tax as may be imposed by law on the amount of such premiums and assessments; and the whole sum received for policies, whether paid in money or other obligations, shall be deemed to be premiums for the purpose of this section." This section treats the agent as if he were the company in Virginia, and imposes duties on him which he could not perform if he were not the receiving agent of the company in Virginia. And this section clearly treats him as such. How could he make oath to the amount of premiums received if they did not pass through his hands? And, indeed, who else could collect the assessments due the company in the State, and receive the premiums, he

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being the only agent of the company here? Or, who would be willing to incur such responsibilities for the payment of taxes, as agent for the company in this State, if the premiums and assessments were not to be paid through him, but to be paid directly, by the parties by whom they were payable, to the agent or officer of the company in New York? Such an idea is repugnant to the whole scope and policy of the law.

The 30th section imposes a penalty of \$1,000 upon the agent for failing to make such returns, or for making a false return. With what reason could the agent have been subjected to such a penalty by the legislature, if it had not been intended that he should be the only agent of the company for receiving the premiums and collecting the assessments, and therefore would have personal knowledge of what he is required to affirm. A bond in the penalty of from \$1,000 to \$5,000, at the discretion of the auditor, to make the semi-annual returns, and to pay the tax, is required to be given through the agent.

But the 32d section, I think, fully confirms this construction of the law. It prohibits any one to act as agent of the company, to make or renew, directly or indirectly, any contract of insurance within this State, or with any person resident therein, otherwise than in compliance with the provisions of this act, or in any way contrary to its true intent and meaning, under the penalty of \$500 for every such offense. The prohibition in this section is express. No one, except the agent appointed as is provided in this act, can make or renew such contracts for the company in this State. Consequently, a contract of insurance, or renewal, made by the plaintiff in error within the State of Virginia, or with any person resident in Virginia, through one of its officers in New York, would fall directly within the prohibition of this 32d section. Therefore, reading the contract in connection with this act of assembly as a constituent part of it, though it professes to have been sealed by the company, and signed by the president and secretary, and delivered in New York (which cannot be true as to the delivery), it was not made by them directly or indirectly; but was made at Richmond with Macmurdo, and countersigned by him, who received the advance premium at Richmond, and there and then, and not until then, it became a contract. The signing by the president and secretary gives no validity to the instrument; but it derives its force and effect, as a contract, from the signing and delivery of

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Macmurdo at Richmond; and would be as effectually, and to every intent and purpose, a contract binding upon the company, if the signatures of the president and secretary had not been affixed to it. It was not, and could not be, a contract made with them directly or indirectly, by the express enactment of the legislature of the State; and their signatures to it have no effect whatever. But the policy itself stipulates that it is "not binding on the company until countersigned by J. B. Macmurdo, at Richmond, and the advance premium paid." It was, then, a Virginia contract, to be performed in Virginia through J. B. Macmurdo, the agent and sole representative of the company in the State. This conclusion is supported by reason and authority. *Daniels et al. v. Hudson River Fire Insurance Co.*, 12 Cush. 417, a case directly in point, and *Fant et al. v. Miller & Mayhew*, 17 Gratt. 47.

Interpreting the policy with reference to its terms and subject-matter, the situation, character and legal status of the parties, and the act of the Virginia legislature by authority of which it was made, and which must be read as a constituent part of it, I am clearly of opinion that the contract was made and to be performed with Macmurdo, the agent of the company at Richmond, Virginia; and that payment of the premiums to him, as the agent of the company at Richmond, by the defendant in error, as they respectively fell due, was a compliance with the terms of the contract according to its spirit and legal effect, and as it was understood by the parties. And, if we consider it further, with reference to the conduct of the parties and the usage of the company, we shall find nothing adverse to this construction, but much to confirm it.

In view of the facts, that payment could only be made to some *agent* of the company; that the assured resided in Virginia, where the contract was made; and that the company had an agent here, with whom the contract was made; and by the law was bound to keep an agent here uninterruptedly, through whom *alone* they could make or *renew* contracts of insurance with citizens of Virginia; to say that it was contemplated or intended by the parties, or either of them, that the assured must every year, when the premiums were about to fall due, leave the agent here and go to a distant city to pay the premium to the agent of the company there, would be a most violent presumption. That the contract was not understood as imposing this needless and burdensome condition on the assured, is shown by the conduct of the parties, and the usage, as far as it is

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exhibited by the record in this case, of the company. The advance premium, and the three subsequent annual premiums, were paid here to their agent Macmurdo, with the unequivocal acquiescence and ratification of the company; and if any objection was ever made, which is very questionable, to the payment of the premium due in 1861, through their agent Macmurdo, it was not made until long after he had received it; and their agent in receiving it violated no instructions, at any rate none which they could lawfully give, as I shall show. The conduct of the parties, then, was in accordance with the interpretation which I have given to their contract.

But there is an indorsement upon the deed, to which no reference is made on its face, purporting to be a "notice." If this indorsement upon the deed is inconsistent with its terms or legal effect, and repugnant thereto, it is void. *Pullerton v. Agnew*, 1 Salk. 172. I propose now to notice only one clause, in connection with the point I am considering. It is in these words: "No payment of premium binding on the company, unless the same is acknowledged by a printed receipt, signed by an officer of the company." Is that indorsement inconsistent with the construction I have given to the contract, that the premiums were to be paid here to the agent, Macmurdo? It is only in reference to that point that I propose now to consider it. If it is a condition inconsistent with the deed upon its face, or according to its legal effect, upon the authority cited it would be void. But I do not think it is in this point of view. It does not require that the *payment* shall be made to an officer. It only prescribes a particular kind of evidence, a printed receipt signed by an officer. Nor does it exclude the signing by the agent at Richmond. If we will now turn to the receipts which were actually given, we shall find that it does not mean that *payment* shall be made to an officer in New York; but that, on the contrary, the right of the party to pay to the agent at Richmond is not taken away by this indorsement. To each of these receipts is annexed a condition or declaration, in these words: "Not binding until paid and countersigned by J. B. Macmurdo, Esq., agent at Richmond, Va." That declaration annexed to the receipt shows, most unquestionably, that when the receipt was signed by the secretary the money had not been paid; and it shows, further, that the money was to be paid to Macmurdo, the agent at Richmond, Va.; and, when paid to him there, he was to sign the receipt and deliver it to the insured. This

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usage of the company, if it may be so called, is in perfect accord with the foregoing interpretation of the contract.

I am clearly of opinion, therefore, that according to the true intent and meaning of the contract, the premiums were to be paid by the assured to the agent of the company in Richmond, Va., and not to the officer or agent of the company in New York.

But it is contended, for the plaintiffs in error, that Macmurdo was not the agent of the company on the 23d of July, 1861, when the premium for that year was paid to him; or on the 23d of July, 1862, when the premium was tendered to him by the assured, and by him refused; because they say that the war, and also their letter to him of the 30th of May, 1861, was a revocation of his power. We will consider this assumption on both grounds.

But there is another postulate of the counsel for the plaintiffs in error, which lies back of this, and should be considered first, or in connection with it; and that is, that the breaking out of war annulled the contract between the parties, and exonerated the plaintiffs in error from all obligation under it.

Forfeitures are not to be favored. And I should be very reluctant to apply the rule, "that war dissolves or suspends contracts between alien enemies," to such a contract as this: and would not do it unless it comes strictly within the rule. As was remarked by KENT, Ch. J., in *Clarke v. Morey*, 10 Johns. 70, the ancient severities of war have been greatly and justly softened by modern usages, the result of commerce and civilization. And the doctrine once held in the English courts, that an alien's bond became forfeited by the war, would not now be endured. That would not be more severe and revolting to our sense of justice, it appears to me, than to hold that the assured had in this case by the war forfeited the money he has paid, and his rights under this contract.

The contract in this case was partly executory, and partly executed. It was altogether executory on the part of the company, in the sense that they had done nothing yet toward the performance on their part. But it had been largely executed on part of the assured, whereby he had become invested with the right to the policy for the life of Wm. S. Warwick, which could only be defeated by his default. This right became vested when the advance premium was paid, and was a right to the insurance, not merely for one year, but for the life of Wm. S. Warwick. A new contract every year was not necessary to give the right; but only the annual

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payment of the premium was necessary to prevent the divesting of the right. The annual payments and giving receipts therefor were not new contracts, but only the performance of a subsisting contract.

The contract being made strictly within Virginia, with an agent residing there, and who was to continue to reside there as long as any stipulation of the contract was unperformed; an agent with whom the contract was to be performed, and to whom the premiums were to be paid in Virginia, as has been shown; it seems to me that this case does not fall within the rule as applied, or within the reason of it, as explained and illustrated by the judges, in any of the numerous cases cited by the learned counsel. In all those cases the contract was to be performed in the enemy's country. Here, the performance is strictly restricted by the contract itself, according to its intent and legal effect, and by the designed policy of the law, by authority of which it was made, to the limits of Virginia. In those cases, and which were particularly relied upon by Judge STORY in the case of *The Rapid*, "they had no power to sue in the public courts of the enemy nation." Upon this contract they could sue or be sued in the public courts of Virginia, even pending the war.

Griswold v. Waddington, 16 Johns. 438, is a leading case relied upon by the learned counsel for the company, and particularly the following passage in the very elaborate and learned opinion of the chancellor: "Here, then (the chancellor observes), we have the final consummation of this discussion, and the sanction of the doctrine we have been tracing, solemnly given by the highest judicial authority in the United States. It reaches to all *interchange*, or *transfer*, or *removal of property*, to all *negotiation* and *contracts*, to all *communication*, to all *locomotive intercourse*, to a state of *utter occlusion*, to any intercourse but one of open hostility, to any meeting but in actual combat." The chancellor has given us, here, a compend of all the cases to which this doctrine reaches; but unfortunately for the plaintiffs in error, they cannot bring their case within the category. In the performance of this contract by the assured, it was not necessary that there should be any "interchange," "transfer," or "removal" of property, from this State into the enemy's country. Nor did its performance require any "communication," "locomotive intercourse," "negotiation and contracts," between him and the plaintiffs in error, or any alien enemy,

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and a state of "utter occlusion to any intercourse but one of open hostility to any meeting but in actual combat" (if there could have been such a meeting between a man near seventy years of age and a New York corporation), was not incompatible with the execution of this contract. It does not appear that there was, before the war in the making and execution of it, any intercourse or correspondence of any sort between the assured and the officers of the company in New York. Certainly none was necessary. It is most probable that they were not known to each other. And if the contract could be made and performed before the war without any intercourse between them, there is no reason why it could not be done during the war.

If the law had been framed by the legislature of Virginia with a special reference to a state of war between the States, its adaption could scarcely have been more complete. The possibility of such a state of war may not have been, and probably was not, in the mind of the legislature when they enacted this law. But as it was the design of the legislature to protect the State and her citizens against abuses and impositions by these foreign insurance companies, who were not amenable to her laws or subject to her jurisdiction, in imposing conditions upon those companies for the privilege of operating in this State, sufficient to give the desired security in time of peace, they were necessarily comprehensive enough to embrace a state of war. And to this end, in framing the law, whether for a state of peace or war, it was necessary to make the operations of the companies within this State strictly local, and subject to the jurisdiction of the State, and completely independent of any foreign jurisdiction in the making, performance, and enforcement of their contracts in this State. This was evidently the leading design of the legislature in the law which was framed for the purpose. Our difference is not as to the principle, but as to its application.

In the numerous cases reviewed by the chancellor in that leading case, I am under the impression that the principle "that war dissolves the contract," is not applied, in a single instance, to a contract made and executed by one of the parties, in the whole or in part, before the war, and where the execution of the contract, on his part, was to be completed before he was entitled to any performance of the other party, and had been partly performed, or where the dissolution of a contract made before the war would work a forfeiture. Such an

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application of the rule would be unreasonable, arbitrary and immoral. The parties, in entering into the contract before the war, did nothing criminal or unlawful, that they or either of them should be liable to the punishment of a forfeiture of their contract. Not so where the contract is made during the war. In that case it is unlawful and criminal, and therefore void. And this, it seems to me, is the proper distinction. When the contract is made before the war, but not executed by either party, and the carrying it into execution would involve a violation of the duty of the parties respectively to their country in the new relations which the war has created; in that case its execution not having been entered upon, and it being uncertain how long the war may last and prevent the execution of the contract, it may be dissolved; and this not to the prejudice of the parties, or either of them, but for their presumed convenience and benefit to be absolved from the obligation of a contract which, in the changed relations of their countries, cannot be carried into execution. On the other hand, if the contract is partly executed, and rights under it have vested, and it cannot be dissolved without the loss or forfeiture of one of the parties, and it cannot be carried into execution consistently with the duty of the parties to their countries respectively while the war lasts, in such case it should not be dissolved, but only suspended. But if it can be carried into execution, notwithstanding the war, without conflicting with the obligation of allegiance of either party, it will be neither dissolved nor suspended.

In the very case we are commenting on, the contract, which was the subject of the suit, was made during the war between alien enemies; and there is not, I think, a sentence in the opinion of the chancellor, or in the cases he reviews, in conflict with the distinction I have taken. On page 471, he cites the case of *Ex parte Bouss-maker*, 13 Ves. 71, which supports it. He says the lord chancellor, having had occasion to notice this subject, observed, "that a debt arising from a contract with an alien enemy could not possibly stand; for the contract would be void. But if the two nations were at peace at the date of the contract, it being originally good, upon the return of peace the right to sue would survive."

Chancellor KENT, commenting on this decision of Lord Chancellor ERSKINE, says: "The chancellor here very clearly and accurately marks the distinction between debts contracted before and after the commencement of the war; and he holds the latter to be absolutely void." And in the latter case of *Buchanan v. Curry*, 19 Johns

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137, when this elaborate review of the cases on this subject was fresh in the chancellor's memory, he enforced an executory contract made and partly executed before the war, between citizens of the two countries respectively which afterward became involved in war. The performance of the contract was completed, *pendente bello*, by one of the parties with the agent of the other, who resided in the same country with the former. And the performance with the agent was held good and binding on the other party, who was an alien enemy, residing in the enemy's country. But the chancellor said: "If such a contract had been entered into during the war, it would have been illegal and void." And again: "It is not unlawful to pay debts, or perform contracts to alien enemies, if the payment be made, or the duty be performed, in one country."

This is a much stronger case than that. In that there was nothing in the contract or law to limit the performance to the State, or to the local agent; in this there is. In that there would have been no forfeiture, or serious loss to the party, by dissolving the contract; in this there would be a cruel forfeiture to one party, and no loss, but a great gain, to the other. In that case the act done was in discharge of an obligation which might have been suspended without loss; this, the performance of a condition to save a forfeiture. In that case, the party could not enforce his contract by suit, *pendente bello*; in this he could. It was held in that case, that "the rule is founded in public policy, which forbids during war, that money or other resources shall be transported, so as to aid or strengthen our enemies. The crime consists in *exporting* the money or property, or placing it in the power of the enemy; not in delivering to an alien enemy, or his agent residing here, under the control of our government." The principle of that case is not in conflict with the cases relied upon by the company's counsel, but clearly takes this case out of the rule applied in those cases; and the decision, it seems to me, is a complete refutation of the argument of plaintiff's counsel, that the war was a revocation of the agency in this case; a point upon which much stress was laid, and which I will now consider further.

In *Clarke v. Morey*, 10 Johns. 70, KENT, Ch. J., says: "It is even held, if aliens are ordered away in consequence of the war, they are still entitled to leave a power of attorney, and to collect their debts by suit." In *King v. Hanson*, 4 Call, 259, Hanson, a native of England, came to Petersburg several years before the war of the revolu-

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tion. After the declaration of independence he refused to take the oath of allegiance to Virginia, and returned to England. Before leaving, he appointed Atkinson & Taylor his attorneys in fact, to make sale of his house and lot in Petersburg. His attorneys made sale of it in 1778, for £1,000, for which they took the bond of the purchaser, payable on demand. After the war Hanson returned and brought suit, on the bond given to his agents, for the purchase-money, and this court affirmed the judgment of the court below, so far as it gave validity to the execution of the power by the agents, and enforced the bond, with *interest*. The only ground upon which interest could have been allowed was, that the creditor had an agent here, to whom payment could have been made. In the case of *Monseax v. Urquhart*, 19 La. 485, it was held that the agency was not "dissolved, or even suspended, by the occurrence of the late war." In *Denniston v. Imbrie*, 3 Wash. C. C. 396, 403, the court say: "The last question respects interest during the war. We think that if the alien enemy has an agent in the United States, or if the plaintiff himself was in the United States, and either of these facts known to the debtor, interest ought not to abate." "The debtor might have paid his debt, either to the creditor, or his agent in this country, without the danger of violating his duty or the laws of the land." This case re-affirms the principle decided by the same court, in *Conn et al. v. Penn et al.*, 1 Pet. C. C. 496. The principle of these cases is settled by the highest court in the land, in the recent case of *Ward v. Smith*, 7 Wall. 447, 452. Mr. Justice FIELD, delivering the opinion of the court, says: "The objection that the bonds did not draw interest, pending the civil war, is not tenable. The defendant, Ward, who purchased the land, was the principal debtor, and he resided within the lines of Union forces, and the bonds were there payable." (The creditor lived within the confederate lines.) "When an agent appointed to receive the money resides in the same jurisdiction with the debtor, the latter cannot justify his refusal to pay the demand, and, of course, the interest which it bears. It does not follow that the agent, if he receive the money, will violate the law by remitting it to his alien principal. Nor can the rule apply when one of several joint debtors resides in the same country with the creditor, or with the known agent of the creditor."

These cases, and others which might be cited to the same effect, are not limited in their application to contracts wholly executed. And I am unable to perceive why it should not be applicable to our

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case as well as to an executed contract. The only acts to be done by the assured were to pay money to the agent at stated periods; and the only thing to be done by the company, through their agent, was to give a receipt for the money so paid, until after the death of William S. Warwick. And we have seen that, even in that event, it was not necessary for the assured to go out of the State to enforce his contract against the insurers, for the policy, even by suit. Now, it seems to me, that, if there is any difference between this case and an executed contract, it is in favor of this case; for these payments were not necessary to be made in discharge of debt, which could be done, and perhaps as well done, after the war; but they were necessary to be done in the performance of a condition, to prevent a forfeiture, and the payments were made at the place where, and to the agent to whom, the *contract* required them to be made.

As to the form of the receipt, and that it should be signed by an officer of the company, that was prescribed by the company as the kind of evidence which it required of the payments, it could not change the law of the contract, which authorized payment to be made to the agent, and, I think I have shown, was not so intended. The obligation of the assured, by his contract, was to pay to the agent; and this requisition was not in conflict with that obligation. To say that the company could withhold these printed receipts on the day of payment, would be to say that they could refuse to receive payment, and thereby release themselves from the obligation of the policy, and subject the assured to a forfeiture, without any default of his, of all the premiums he had paid, a conclusion against which the moral sense of mankind would revolt. I hold, then, if, on the day and place when and where payment was to be made, the assured offered to pay to the agent, who had not been provided with the printed receipts, the company will be presumed to have waived that requisition, and a payment to the agent without them would be good, and a sufficient compliance with the contract.

But it is contended that, by the letter of May 30, 1861, the agency was revoked. I do not think so. On the contrary, it evidently recognizes a continuing agency. It authorizes the agent to adjust difficulties as to policies in a certain way, and requests, "if this does not meet your views, let us know what you would advise." If the instruction must be construed, that the premium should be paid in New York city, and not in Richmond, I think it is clear

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that they had no right, under the contract, to impose such a condition. And we find in their next letter they say, "must be paid here *or by draft* on this city." Again they say, "we wrote you on 30th May last," etc.; "renewals to be paid here, or *by draft* on this city." And thus their agent seems to have understood their letter of 30th May, for he received payment of the premium on the 23d July, 1861, and on the same day wrote to them to send the printed receipt. And again, on the 5th of August following, he wrote to them: "I wrote you on the 23d ultimo, requesting you to send me the company's printed receipt for Mr. Corbin Warwick's premium on policy No. 4758, and have not heard from you; *as soon as I get the receipt I will make the remittance to you.*"

While this company had no authority, under the contract, to change the place of payment, they had undoubtedly the right to refuse payment in confederate money, and to require it to be made by draft on New York or in New York funds. This their agent was prepared to do. But in their letter of 6th of August, although they acknowledge that, in their letter of May 30th, they had authorized payment of the premium to be made by draft on New York, they refused or failed to inclose the printed receipt. By neglecting or refusing to send the printed receipt to their agent, as requested, they failed to receive the draft, which would have been remitted to them upon its receipt. And this being their last communication to him during the war, he did not remit to them the draft, but held it until probably 1863, when it was taken from him under the sequestration act. It was the implied refusal of the company, therefore, to receive payment from their agent in the mode prescribed by themselves, which prevented the remittance being made. And, if it is a loss to them, they have nobody to blame but themselves. - It was certainly not the fault of the assured, who had honestly paid it in the kind of funds which they required, and it would be unjust to require him to pay it again.

In all their correspondence with their agent, I do not find an intimation of a purpose to revoke his agency. And under the act of assembly, which is to be read as a part of their contract, they could not, until they appointed another agent in his place. Were they relieved from this obligation by the war? Or could their failure to have an agent here to receive payment of the premiums release them from the obligation of the policy, or entitle them to a forfeiture? It seems to me that both these questions must be

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answered in the negative, and that they could not avail themselves of their own disability for such a purpose. But they are questions which do not arise in this case, inasmuch as there had been no revocation of the agency of Macmurdo.

In their letters they express a disposition to act liberally toward their southern policy holders. In this they may have been sincere. But their failure to send the printed receipt to their agent, when requested, to enable him to remit them a check upon New York, as they required, in payment of the premium, which he informed them had been received, does not show a disposition to afford any facility to the assured to fulfill the condition of his policy. If the receipt had been sent and lost they could not have sustained any loss by its miscarriage. But the probability is, it would have reached its destination, as did their letters both ways, and that they would have received a draft from their faithful agent, on New York, for the premium. It is impossible to shut our eyes to the fact that the company was largely interested in defeating these policies; and considerations of that sort may have had more influence upon their conduct than a desire to promote the interests of their policy holders. I am well satisfied that, in this case, they might have received the premiums from the assured in New York funds, if they had been very desirous to receive them. At any rate their agent, in receiving payment of the premium for 1861, in a draft on New York, did not violate his instructions; and in refusing to receive that for 1862 at Richmond, if he acted under instructions, they were instructions which the company had no right to give. I am, therefore, of opinion to affirm the judgment.

Judgment affirmed.

CHRISTIAN, J., and MONCURE, P. J., dissented.

NOTE. - See *Robinson v. International Life Assurance Society*, 1 Am. Rep. 400.

CASES
IN THE
SUPREME COURT
OF
NEVADA.

GILMAN, appellant, v. THE COUNTY OF DOUGLAS.

(8 Nov. 97.)

Gold contract — payment in notes under protest — waiver.

The holders of certain gold warrants accepted payment thereof in treasury notes under protest, and surrendered the warrants. *Held*, that the payees could not afterward recover the difference between the value of the notes and gold coin.

ACTION on a gold contract. The facts are stated in the opinion of the court.

Clayton & Davies, for appellants.

Clarke & Wells, for respondents.

LEWIS, C. J. In the year 1865 the plaintiffs entered into a contract with the proper authorities of Douglas county to erect a courthouse for the sum of \$18,500, to be paid in gold or silver coin of the United States. The building was completed in accordance with agreement, accepted by the county, and warrants upon the building fund were duly issued to the plaintiffs for the full sum due them, several of which were paid in coin. About half the entire amount, however, was paid in treasury notes, the plaintiffs protesting against payment in that currency, but accepting the money and surrendering their warrants.

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This action is now brought to recover the sum of \$4,000, claimed to be the difference between the value of the treasury notes paid and gold or silver coin, which the contract called for. The question is raised upon general demurrer, whether, upon these facts, the plaintiffs are entitled to recover. The court below held not, and our conclusion is, the decision is correct. That in the market there is a difference in value between treasury notes and gold and silver, and in all cases where the act of congress has not ordained otherwise the courts will, in enforcing the rights of contracting parties, recognize that difference, are propositions which need in no wise be questioned in this case; nor will it be denied by counsel for appellants, that for the discharge of debts, where the parties have not stipulated for payment in any particular kind of money, dollars in treasury notes are the equivalent of dollars in gold or silver. Where the parties to a contract have designated the kind of money to be paid, this court has held that such contract may be specifically enforced by a judgment in the kind of dollars agreed to be paid; without, however, holding that even in such case a dollar in treasury notes is not equal to a dollar in coin, but simply that the contract between parties in such cases may be enforced according to its letter. But where parties make no distinction between the different currencies, the courts are compelled to treat them as equal for the payment of all private debts. Hence, if nothing were said between the parties in this case as to the kind of money to be paid, a payment of the stipulated sum in greenbacks would unquestionably be held a complete satisfaction of the contract, and no action could, after the acceptance of such money, be maintained to recover the difference in value between it and any other kind of money. Is the case different when, as in this case, the creditor accepts treasury notes at par, in payment of a contract calling for coin? We think not. As already stated, all debts may be discharged in treasury notes, at their par value, where the parties have not contracted for a different currency. Where is the difference in principle, if they contract for the payment of one kind, but the creditor afterward accepts the other, the debtor tendering it as the equivalent of the currency agreed to be paid? In the first case the equality of the currencies is acknowledged at the time of entering into the contract; in the latter, when the depreciated money is accepted in the execution of it.

As the right to recover coin in payment of a debt depends entirely

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upon the action and contract of the parties, the creditor who accepts treasury notes at their par value, in payment of a debt payable in coin, is precisely in the same position as if he had not contracted for coin in the first instance. The defendant tendered treasury notes in satisfaction of the warrants, which were surrendered, and thus the contract between the parties was completely executed. Not, it is true, according to its letter or spirit; but the plaintiffs accepted a performance by the defendant different in character from what the contract called for. Was not this a complete waiver of their right to subsequently claim damages for the failure to perform, in accordance with the contract? This is not like the case of an acceptance of a part of a debt in satisfaction of the whole. In that case it might be said there was no consideration for the agreement to relinquish what remained, and, therefore, the balance might be recovered, notwithstanding the agreement to the contrary. But here the law made gold and treasury notes the equivalent for the payment of this debt, unless the parties stipulated otherwise. They did at first so stipulate, and the payment might have been enforced in gold; but the subsequent acceptance of treasury notes, the defendant tendering them in satisfaction of the contract, places the plaintiffs in a position that they are estopped to deny that the contract was fully complied with. We take it to be law that the acceptance of a performance differing from that contracted for will estop the party so accepting from afterward taking advantage of the failure to perform in accordance with the contract. Such is the position occupied by the plaintiffs.

The defendant did not agree that the notes should be taken at their actual value in the market, but tendered them in full satisfaction of the claim against it. Upon what principle, then, can it be held that the plaintiffs could accept and retain them at a value not assented to by the defendant, and recover the difference in value between them and gold? If the plaintiffs did not deem the payment in treasury notes a fulfillment of the contract, it was then their duty to reject them entirely and seek their remedy, if any they had, on the contract. That they protested against payment in paper places them in no better position than if nothing had been said by them, as they afterward voluntarily accepted it. They protested with the tongue, but assented by their acts.

Judgment affirmed.

PROCTOR v. JENNINGS, appellant.

(6 Nov. 88.)

Aquarian rights — obstructions — injury to property above.

A dam was constructed on a stream in a manner in no wise injurious or prejudicial, at the time of its erection, to a mill owner above; but, by reason of the unusual and unprecedented inflow of waters from the working of mines located on the stream above the mill, the obstruction became so great as to prevent the regular and efficient operation of the mill. *Held*, that the owner of the dam was not responsible for the injury thus occasioned, and that an injunction would not lie compelling him to lower the dam.

INJUNCTION to restrain the continuance of a dam at such a height as to interfere with the operation of a mill above. The facts are stated in the opinion of the court.

Hillyer, Wodd & Deal, for appellant.

Henry K. Mitchell, for respondent.

LEWIS, C. J. 1st. "In the year 1865 the plaintiff constructed a water mill upon Six Mile Cañon, the motive power of the same being the water of the stream of said cañon, conducted therefrom by a ditch leading from a point above the mill to the said water-wheel. After passing over said wheel, the water fell into the channel of said stream, and passed on down the same, there being sufficient fall from the bottom of the wheel to the channel, and from there down sufficient grade to the channel, to enable the water leaving the wheel to pass off freely, and without obstructing the working of the same. As to the defendant, the plaintiff was the prior appropriator of the water privilege to the extent above mentioned, and he has since done nothing by which he has lost any of the rights so acquired, or diminished their extent."

2. "Subsequently to the acquisition of plaintiff's rights, and in October, 1867, the defendant constructed a dam across the channel of said stream, at a point about one hundred and fifty-five feet below the wheel of plaintiff, and below and east of the east line of plaintiff's land, together with a waste way, flume and ditch, for the purpose of furnishing water power for certain works of defendant

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below. At the time of constructing said dam, the defendant was fully apprised of the prior rights of plaintiff, and was expressly notified by him not to obstruct the same in any manner to interfere with those rights."

3d. "The effect of the construction of defendant's dam was to cause the sediment coming down said stream to gather above the dam to the level of the bottom of the ditch leading from the same, and to cause the water of the stream to set back toward plaintiff's wheel, upon the same level, and thus diminish very materially the grade of the channel below said wheel. But, at the time of its construction, it did not so back the water or sediment, or diminish the grade as to prevent the free flow of the water from plaintiff's wheel, and did not at all interfere with the working of the same."

4th. "The dam so constructed by defendant has not since been altered in height, and there has been no alteration of the level or altitude of the flume, and ditch leading from the same. During the latter part of the year 1867, the whole of the year 1868, and up to the —— day of June, 1869, the works of defendant below did not in any manner obstruct or interfere with the free flow of the water from plaintiff's wheel, which was in use during all said period, or in any manner obstruct or interfere with the working of said wheel; and had the waters of said stream continued to flow down to the said works of plaintiff and defendant in their natural state and condition in which they did run and flow down to the same at the time of defendant's appropriation, and during the period aforesaid, up to the —— day of June, 1869, the said works of defendant would not materially have interfered with the workings of plaintiff's wheel, or the free flow of the water therefrom."

5th. "About the —— day of June, 1869, certain parties who were in the possession of mining claims along the channel of said stream, above the works of both plaintiff and defendant, adopted a new mode of working their claims, and of using the waters of the stream in the working thereof. They had theretofore so used the waters as to permit the same to flow down naturally and regularly, and the change consisted in penning the water up for longer or shorter periods, in reservoirs constructed for that purpose, and then permitting the same to escape suddenly and in large quantities, and pass down the stream with a flood. The effect of this was to carry down, by the power of the floods of water so discharged, large amounts of tailings and sediment, collected in said reservoirs and

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lying in the channel of said stream, to the works of defendant, and thereby fill up his dam above the ordinary level of discharge, and to cause the same to accumulate in masses above said works as far back as the wheel of plaintiff, and to cause the back water and sediment to obstruct the free flow of water from the wheel of plaintiff, and prevent the regular and efficient working thereof."

6th. "Had it not been for the acts above mentioned, the works of defendant would not have materially interfered with the working of plaintiff's wheel; and on the other hand, had it not been for the works of the defendant the acts of said miners would have done no injury to the plaintiff; and the grade of the channel below said wheel, if left in the condition in which it was prior to the construction of defendant's dam and ditch, would have been sufficient to discharge freely all the water and sediment coming down said stream, notwithstanding the irregular flow thereof."

Upon these facts found by the court below, a decree was rendered enjoining the defendant from continuing his dam at such a height as in any manner to interfere with or retard the revolutions or workings of the plaintiff's water-wheel attached to the mill and buildings mentioned in the complaint. The defendant appeals.

But one question is presented by the record, or need be considered by the court, namely: Can a dam erected on a stream in a manner in nowise injurious or prejudicial at the time of its erection to a mill owner above, but which, by reason of circumstances happening subsequently, and which could not have been anticipated at the time, operating in connection with it, and so causing the water to flow back upon the mill above, be held such obstruction as to authorize its abatement, or justify a recovery of damages against the person so building the dam for injury thus occasioned? We think not. Priority of appropriation, where no other title exists, undoubtedly gives the better right. And the rights of all subsequent appropriators are subject to his who is first in time. But others coming on the stream subsequently may appropriate and acquire a right to the surplus or residuum, so the rights of each successive person appropriating water from a stream are subordinate to all those previously acquired, and the rights of each are to be determined by the condition of things at the time he makes his appropriation. So far is this rule carried that those who were prior to him can in no way change or extend their use to his prejudice, but are limited to the rights enjoyed by them when he secured his. Nor

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has any one the right to do any thing which will, in the natural or probable course of things, curtail or interfere with the prior acquired rights of those either above or below him on the same stream.

The subsequent appropriator only acquires what has not been secured by those prior to him in time. But what he does thus secure is as absolute and perfect, and free from any right of others to interfere with it, as the rights of those before him are secure from interference by him. Upon what principle, then, can it be held that he is responsible for injuries resulting to the prior appropriators, occasioned not immediately by his acts of appropriation, but by unforeseen and fortuitous circumstances happening after his appropriation, and acting in connection with the means employed by him to appropriate the surplus water?

Here the defendant had the undoubted right to make use of all the water flowing from the plaintiff's mill, and to build a dam or employ any other means of appropriation not prejudicial to the rights of the plaintiff. But at the time Jennings built his dam it did not in any way interfere with the right of Proctor, nor is it claimed that in the ordinary course of things it would have done so, or that it could have been anticipated that the immediate cause of the injury would have occurred. Under such circumstances, the law, we think, does not hold the defendant liable, nor adjudge his dam such an obstruction or nuisance as may be abated.

The Inhabitants of China v. Southwick et al., 3 Fairf. 238, was an action on the case brought to recover damages for an injury done to the plaintiffs' bridge at the head of twelve-mile pond, raised, as it was alleged, by the defendants at the outlet of the pond. It appeared that the defendants built the dam at the point designated, and thereby raised a head of water, but not so high as to flow or injure the bridge of plaintiffs. Afterward, however, by heavy rains and a violent storm of wind the waters were thrown upon the bridge, and it was destroyed. The court held the defendants not liable, saying: "The jury found that the head of water raised by the defendants' dam was not, at the period complained of, high enough to flow the plaintiffs' bridge or do damage thereto. Its erection, then, was a lawful act, not in itself calculated to do any injury to the plaintiffs. Their loss was occasioned, as the jury have found, by great rains, or by the violence of the wind. If the dam had not raised the water to a certain height, the rain or the wind superadded might not have done the damage. It may have been

one, then, of a series of causes to which the injury may be indirectly ascribed. Their connection, however, was fortuitous, and resulted from an extraordinary and unusual state of things. Neither the rain nor the wind was caused by the dam. The bridge had continued unimpaired for a series of years, while the dam was higher than it was when the bridge was carried away. Such an event could not, therefore, have been reasonably calculated upon or foreseen. It would be carrying the doctrine of liability to a most unreasonable length to run up a succession of causes and hold each responsible for what followed, especially where the connection was casual and unexpected, as it was here, and where that which is attempted to be charged was in itself innocent. The law gives no encouragement to speculations of this sort. It rejects them at once. Hence, the legal maxim: *Causa propinqua non remota spectatur*.

* * * If there had been no dam, the injury might not have happened; but the defendant had the right to erect it, and that without being held answerable for remote and unforeseen causes."

Again, the same rule is thus laid down in *Bell v. McClintock*, 9 Watts, 119: "When the plaintiff erected his dam, he was bound to notice not only its effects at the time, but its effects at all seasons as well. In this stream, as well as all other large streams which fall into the Alleghany river, there are regular freshets or floods which swell the volume of water, and thereby enable the inhabitants to raft down the river the various products of the country. They are expected with considerable certainty at fixed times and seasons. It was the duty of the plaintiff with reference to this, which is at least of yearly occurrence, to calculate the immediate probable effects the dam would have at all seasons of the year on the property of his neighbors above as well as below his erection. A neglect to use the necessary precaution, or a miscalculation of its effects, where it works an injury to another, may be compensated in damages. *But where the injury arises from some cause out of the ordinary course, from some unusual cause, as, for instance, from a flood or freshet such as has been described by the witnesses, the owner of the dam is not liable to damages. It is damnum absque injuria.* They are not such accidents as ordinary foresight or prudence can guard against, and for this reason a distinction has been taken as to the liability of the party." See also Angell on Water Courses, § 347, *et seq.*

By the rule adopted in these cases, which seems not only a cor-

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rect but just one, it was incumbent on the defendant to so erect his dam that it would do no injury to the plaintiff, either under the then existing circumstances, or such as might be anticipated to happen in the future; but he was not required to go further, nor where he has used such precaution is he liable for injuries resulting from causes which could not be foreseen in conjunction with his dam. Such is the result of the rule when applied to this case.

That he could not have foreseen or anticipated the new mode of working the mines above himself and plaintiff is a self-evident proposition, if, as found by the court below, it were in fact a new process.

The decree must be vacated. It is so ordered.

JOHNSON v. WELLS, FARGO & Co., appellants.

(6 Nov. 224.)

Common carrier — injuries to passenger — measure of damages.

In an action against a common carrier for injuries sustained by a passenger an instruction allowing the jury, in estimating damages, to consider the "character" of the plaintiff, or his "pain of mind" aside and distinct from his bodily suffering, is error.

ACTION to recover for injuries sustained by a passenger in consequence of the upsetting of a stage coach. The principal point in the case is in reference to the charge to the jury, which is set forth in the opinion of the court.

Garber & Thornton and *A. C. Ellis*, for appellants.

Thomas P. Hawley, for respondent, cited *Fairchild v. Cal. Stage Co.*, 13 Cal. 601; *Ransom v. N. Y. & Erie R. R. Co.*, 15 N. Y. 416; *Morse v. Auburn & S. R. R. Co.*, 10 Barb. 623; *Curtis v. Rochester & S. R. R. Co.*, id. 291; 18 N. Y. 542; *Williams v. Vanderbilt*, 28 id. 224; *Canning v. Inhabitants, etc.*, 1 Oush. 452, in support of the position that pain of mind may be considered in estimating damages for injuries sustained by passengers.

WHITMAN, J. It is urged that "the erroneous charge of a judge having *no bearing* on the issues should be disregarded on a motion for new trial," and "the giving of an instruction inapplicable to the evidence is not a fatal error for which a new trial will be granted." Within proper bounds, and in cases perfectly clear, these propositions are true, but they do not touch this case, as will be seen by the recital of the instruction complained of, which was vital to the case, and, if wrong, must necessarily have misled the jury. Here it is:

"In estimating damages, the jury should take into consideration the bodily suffering of the plaintiff, his pain of mind, his character and his business, also all expenses, if any, incurred on account of the injuries he received, and the employment of physicians, and nurses, medicines and board, and also whether the injuries are likely to be permanent."

The law is well settled that, in an action like the present, a plaintiff may recover for bodily suffering; though were it a new question, it may well be doubted whether any satisfactory reason could be given for the rule, upon the received theory of the action, which is purely compensation for the injury; as it is difficult to conceive how bodily pain or suffering can be estimated in dollars and cents. Such, however, is the undoubted rule upon authority.

Omitting the words, "his pain of mind, his character," the remainder of the instruction states the law correctly, and was applicable to the pleadings and evidence in this case. Whether these words should have been used is the question here, as they present two distinct elements of danger for the consideration of the jury, and must be supposed to have influenced the amount of the verdict more or less—how much or how little it is impossible to tell.

Of course, there can be no bodily suffering without pain of mind, and to that extent pain of mind is a proper subject for compensation; but in such consideration there is no subdivision. The proposition here is, that, as a distinct and separate cause of damage, such pain may be estimated. In the authorities there is an apparent confusion, but more apparent than real. Mr. MAYNE says: "Pain and suffering undergone by the plaintiff are also a ground of damage." Mayne on the Law of Dam. 264. This language is very general, and the only citation in its support is the case of *Blake v. Midland Railway Co.*, 18 Q. B. 111; A. & E. 110. That action was brought by a widow on the death of her

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husband, and COLERIDGE, J., deciding that in such a case mental anguish could not be considered, utters the following dictum: "When an action is brought by an individual for a personal wrong, the jury in assessing the damages can with little difficulty award him a *solatium* for his mental sufferings alone, with an indemnity for his pecuniary loss." This decides nothing, although the dictum of a wise judge.

The rule is stated in a recent work as follows: "In an action for negligent injury to the person of the plaintiff he may recover . * * a fair compensation for the physical and mental suffering caused by the injury." Upon the word "mental" is this note: "The jury in estimating the damages may take into consideration the anxiety and mental suffering of the plaintiff at the time of the occurrence of the injury, naturally incident to the risk and danger of the occasion." "The mental suffering and anxiety caused by the apprehension of danger, or by efforts to escape from the consequences of the injury, may be considered by the jury." Shear. & Red. on Neg. 662, 663, § 606. To maintain these propositions, three cases are cited, two from Connecticut and one from Massachusetts.

The case of *Masters v. Warren*, 27 Conn. 293, is simply affirmatory of *Seeger v. Burkhamsted*, 22 id. 298, so it will be sufficient to quote the language of the latter, which is to this effect: "Such actual injury is not confined to the wounds and bruises upon his body, but extends to his mental suffering. His mind is no less a part of his person than his body; and the sufferings of the former are oftentimes more acute and also more lasting than of the latter. Indeed, the sufferings of each *frequently, if not usually, are (act?) reciprocally on the other*. The dismay and consequent shock to the feelings which is produced by the danger attending a personal injury, not only aggravate it, but are frequently so appalling as to suspend the reason and disable a person from warding it off; and to say that it does not enter into the character and extent of the actual injury, and form a part of it, would be an affront to common sense.

In the Massachusetts case, METCALF, J., says: "The argument for the defendant assumes that the plaintiff sustained no injury in his person within the meaning of the statute, but merely incurred risk and peril which caused fright and mental suffering. *If such were the fact, the verdict would be contrary to law*. But we must suppose that the jury, under the instruction given to them, found that the plaintiff received an injury in his person—a bodily injury—

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and that they did not return their verdict for damages sustained by mere mental suffering, caused by the risk and peril which he incurred. And though that bodily injury may have been very small, yet if it was a ground of action within the statute, and caused mental suffering to the plaintiff, that suffering was a part of the injury for which he was entitled to damages." *Canning v. Williamstown*, 1 Cush. 452.

Upon a close examination of the facts and full opinion in the cases cited, it will appear that the mental suffering allowed for therein was that preceding and at the time of the injury. So that they do not go so far, nor make the allowance so general, as the instruction in the present case; but even thus restricted, they introduce an element dangerous, because purely imaginative. How can such damages be estimated in money? The mental agony of a timid woman would be entirely different from that of a bold man. No two cases could be weighed in like scales. To properly estimate such a cause of damage, the door must be opened to the realms of philosophy, physiology and psychology. Again, the cases do not cohere. Connecticut says the "mind is no less a part of the person than the body;" and hence there need be no bodily injury to allow a recovery, but Massachusetts says, there must be some bodily injury upon which to base the action.

As the object here is to trace this rule, if rule there be, allowing damages for mental pain, and to ascertain, if possible, its basis, and to consider if that be sound; note in this connection that the Hon. ISAAC T. REDFIELD, in a work equally recent, states the rule thus: "But it has always been held in this country, that the bodily pain and suffering caused by an injury for which one party is legally entitled to claim compensation of the other, were legitimate elements, to be proved and considered by the jury in estimating the pecuniary compensation which they shall award, notwithstanding the difficulty of reducing pain and pence to a common measure." "In actions against carriers of passengers for injuries, there seem, as we have said, to be no well-defined rules for estimating damages. It is a matter to be submitted to the sound discretion and judgment of the jury, who are to consider the *actual loss* to the plaintiff, present and prospective, which is the very lowest amount they will feel justified in giving in any case. Beyond this, any rule for damages must be regarded as more or less *terra incognita*." Redf. on Carr., §§ 431, 433.

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Here, it will be seen, the author ignores mental pain as any separate and distinct element of damage. He reiterates the same doctrine in another work. Redf. on the Law of Railw. 222.

Mr. SEDGWICK says: "The damages for a personal injury in cases of simple trespass, free from malice, or of simple negligence (where the rule seems to be the same), should, as far as a money standard is applicable, be such as to compensate the injured party for such loss of time, medicine and other expenses, physical pain, and as it seems also mental distress, as are fairly and reasonably the plain consequence to him of the injury." * * * "The latter element of compensation is very clearly justified by the decisions in the State of Connecticut, which hold that the plaintiff is entitled to a pecuniary equivalent for the apprehensions and anguish of mind naturally excited by the risk and danger at the time of the injury." *Seger v. Barkhamsted*, 22 Conn. 290; *Masters v. Town of Warren*, 27 id. 293; *Lawrence v. Housatonic R. R. Co.*, 29 id. 390.

So also in Maine. *Mason v. The Inhabitants of Ellsworth*, 32 Me. 271. And in California. *Fairchild v. Cal. Stage Co.*, 13 Cal. 599. So in a very late case the supreme court of the United States say, that in these actions "there can be no fixed measure of compensation for the pain and anguish of body and mind, nor for the loss of time and care in business, or the permanent injury to health and body." *Illinois Central R. R. Co. v. Barron*, 5 Wall. 90; Sedg. on Dam. 648, note. It will be seen that the author takes the same view of the scope of the Connecticut cases as has been hereinbefore expressed.

The Maine case does not sustain the text, as HOWARD, J., there says: "The jury were instructed that, in their assessment of the damage, they should compensate the plaintiff for his suffering of bodily pain. We consider that ruling to be correct, and that it is in harmony with the decisions in this and in other States, and that it is now the settled doctrine." *Verrill v. Minot*, 31 Me. 299. TENNEY, J.: "It has been settled in *Verrill v. Minot*, that such an allowance is proper." The objection was that "the instruction that the jury should compensate for bodily pain was erroneous."

Turning to *Verrill v. Minot*, we find the same state of facts; the objection being that "the bodily pain was not a legitimate item of damage. There is no standard to compute by. The allowance of it arose from assimilating the suffering to that in slander." To which the court replies: "The statute allows a recovery for 'bodily

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injury.' That is something else than loss of time and expenses. Pain is a part of bodily injury inherent in it. Though difficult to admeasure and assess, the injured party is entitled to recover for it. It must be confided to the sound discretion of the jury." Thus it appears that the rule in Maine is precisely the same as intimated heretofore in this decision.

In *Fairchild v. Cal. Stage Co.*, 13 Cal. 599, this important question is thus curtly settled: "The fourth instruction is objected to because it asserts that the plaintiff, if entitled to recover, may recover damages for 'mental anguish.' We cannot see why compensation should not as well be given for pain of mind, as pain of body." Counsel in the case, in support of the instruction, cite only the oft-repeated case of 22 Connecticut.

In the supreme court of the United States, it is said argumentatively solely, in an action for damages in the death of a party, that, "if the suit is brought by the party, there can be no fixed measure of compensation for the pain and anguish of body and mind, nor for the loss of time and care in business, or the permanent injury to health and body." *R. R. Co. v. Barron*, 5 Wal. 90.

When it appears, as has been shown, that the author's text depends entirely upon a dictum of the supreme court of the United States and the cases from Connecticut, it is not surprising that he guardedly says: "And as it seems also mental distress:" there is no warrant for putting it any stronger, if so strongly.

Counsel for respondent, in support of the instruction, cites some of the cases already referred to, and several others, none of which, however, even apparently support the point under discussion except that of *Ransom v. The N. Y. & Erie R. R. Co.*, 15 N. Y. 415, and there the question did not arise, as will be seen by reference to the instruction, which was, that "the plaintiff was entitled to recover the necessary expenses he had incurred for nursing and medical aid, for the bodily pain and suffering resulting from the injuries," * * * and the exception was, "to that part of the charge in which the judge stated that the jury might award damages to the plaintiff for his bodily pain and suffering." The case in 10 Barbour, relied on by the court in 15 New York, and by counsel in this case, is certainly against their position, for the court there says, "exemplary or punitive damages, or smart money, as they are sometimes called, are given by way of punishment for intentional wrong, and to operate as an example to others. The law in such cases looks

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beyond the act and its injurious consequences to the motives, and metes out its punishment to that also. In such cases, the compensation for the actual pecuniary damage is rather subsidiary and incidental. There the mental suffering, the injured feelings, the sense of injustice, of wrong or insult on the part of the sufferer, enter largely into the account, and the measure of justice is graduated by that of the offender's turpitude. Here the damages are strictly compensatory for the actual injury, of which the bodily pain and suffering were an essential part. Nothing was authorized to be allowed by way of punishment or example in reference to motives, or by way of compensation for the trouble of seeking redress." *Morse v. Auburn & Syracuse R. R. Co.*, 10 Barb. 625. Here the rule is correctly stated as laid down by Greenleaf. "Injuries to the person or to the reputation consist in the pain inflicted, whether bodily or mental, and in the expenses and loss of property which they occasion. The jury, therefore, in the estimation of damages, are to consider, not only the direct expenses incurred by the plaintiff, but the loss of his time, his bodily sufferings, and, if the injury was willful, his mental agony also." 2 Greenl. Ev., § 267.

It is safe to say that no well-considered case can be found to support the instruction in the present. Where damages have been allowed for mental pain as an element of damage distinct from bodily suffering, it will be found that it was for mental agony at the time of the accident, and the authority to support that allowance is so slight that it is unsafe to follow.

Many cases will be found where language has been used seemingly warranting the instruction under consideration; but upon a careful review it will be seen that the expressions either were purely dicta, or else were unwarranted by the facts or law given the jury, or were uttered upon the theory that something other than compensation should be recovered.

Look at the cases (and in those before cited, with those now to be, all are included which a tolerably extended examination has been able to find): The California case has already been noticed; a similar one exists in Maryland. In response to an objection to an instruction, directing the jury in estimating plaintiff's damages to consider "the physical and mental suffering he sustained by such injury," the court says: "There was no error in the instruction given under the plaintiff's third prayer." Only that, and

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nothing more! And in the same opinion the section of Greenleaf just quoted is cited with approval, the court ignoring or overlooking in its decision the word "willful." *Stockton v. Frey*, 4 Gill. 406.

In Pennsylvania, the instruction of the court of common pleas was that "the pain and personal affliction incident to the injury were to be compensated in damages;" and the supreme court says: "It is undoubtedly true that, in some actions for personal injuries, juries in estimating the damages are to take into consideration the personal suffering caused by the wrong." So are the decisions. In cases of libel or slander, of willful torts to the person, and in cases of negligence other than those that are breaches of contract, in cases of negligence which causes a personal injury, it has often been held that a jury may take into consideration the bodily and mental pain attendant on the injury.

It must be admitted that it is no more possible to determine the pecuniary value of pain, in this class of cases, than in such a one as we now have before us. But such actions are not remedies sought for broken contracts. The wrongs complained of bear a nearer resemblance to a public offense. In assessing damages in such actions, juries are always allowed a larger license than in actions on contracts, and with some reason. In this State, at least, it seems to be the doctrine, that the circumstances attending such injuries may warrant an assessment of damages beyond those that are merely compensatory. It might well be, therefore, that a different rule should be applied to them from that which should be applied in suits in broken contracts. Yet it is not to be denied that the authorities recognize no such difference. In this State, the question has never directly arisen; but I know of no decision anywhere, that a passenger personally injured by the neglect of a carrier to transport him safely has been denied compensation for the pain caused by the injury. Such compensation is denied to one who sues for injury to his relative rights; but the immediate sufferer has been held entitled to it, whenever the question has been raised. And that such is the law is shown by the precedents. Chitty, in the second volume of his work on Pleading, page 647, gives the form of a declaration by a passenger against the owners of a stage coach for overloading and improperly driving it, whereby the coach was overturned and the plaintiff's leg was broken. In each of the courts the great pain of the plaintiff is laid as a substantial

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injury. And so far as any decisions of the English courts are to be found upon this subject, they recognize the right of a plaintiff to damages for such a cause. In *Theobald v. The Railway Passenger Assurance Co.*, E. L. & Eq. 432, where it appeared that the defendant had undertaken to pay a reasonable compensation for any personal injury received while traveling in a railway car, it was held by the court of exchequer that the expense, pain and loss of the plaintiff were proper subjects, and the only proper subjects, to be considered in assessing the damages. In *Morse v. The Auburn & Syracuse R. R. Co.*, 10 Barb. 621, and in *Curtis v. The Rochester & Syracuse R. R. Co.*, id. 283, it was decided that, in actions against passenger carriers for negligence resulting in personal hurts, bodily pain and suffering are part and parcel of the injury, for which the injured party is as much entitled to compensation in damages as for the loss of time and the outlay of money.

These cases were reviewed by the court of appeals in *Ransom v. The New York & Erie R. R. Co.*, 15 N. Y. (1 Smith) 415, before noticed, and the doctrine asserted in them re-asserted¹. I do not find that it has been even doubted in any court. Juries are required to estimate, in the best way they can, what is a just recompense for pain suffered. Though we have no decisions in this State, we have dicta of judges sufficient to indicate the same opinion of the law.

In *Laing v. Colder*, 8 Barr. 479, which was an action against a passenger carrier for negligence, whereby the plaintiff's arm was broken while he was traveling in a railroad car, Judge BELL, in delivering the opinion of this court, remarked that "injuries to the person consist in the pain suffered, bodily or mental, and in the expenses and loss of property they occasion. In estimating damages, the jury may consider, not only the direct expenses incurred by the plaintiff, but the loss of his time, the bodily suffering endured, and any incurable hurt inflicted, for these may be classed among necessary results." A similar remark was made by the present chief justice, in *Pennsylvania R. R. Co. v. Kelly*, 7 Casey, 379. Some of these cases recognize the difficulty of applying a pecuniary balm to suffering, but deny that this furnishes any reason why it should not be done. It must, therefore, be considered as a rule of law, that, in actions for personal injuries sustained by a passenger in consequence of the negligence of a passenger carrier, plaintiffs are entitled to recover pecuniary compensation for pain suffered, and

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that juries in assessing damages may consider that as an element. *Pennsylvania R. R. Co. v. Allen*, 53 Penn. 276.

With the final conclusion of this opinion no fault is to be found. Such is undoubtedly the law; but all that is therein said about mental suffering as a distinct element of damages is uncalled for by the case; based upon the idea of punishment to defendant, rather than compensation to the plaintiff, a rule unknown to the law in actions of the kind considered, and the authorities cited do not sustain the position taken. This is evident on reading the quotation as to the citations in the English case and in those from New York. In *Laing v. Colder*, the dictum of Judge BELL is not included in the rule he lays down, which is correct; and the natural conclusion is, that he did not mean to specify mental pain disconnected with physical suffering as a separate element of damage.

The remark made by Judge WOODWARD in 7 Casey was, that "it was proper for the jury to understand that the sufferings endured by the boy, and the disfiguration of his form, and whatever was merely personal to him, should not enter into the estimate of the father's damages, because for this the son would have a right of action." There is no doubt about the proposition, but how it serves to sustain the idea that mental suffering may be distinctively allowed for is difficult to see.

The rule as laid down in *Laing v. Colder*, 8 Barr., is substantially the one universally followed. Probably the desire to afford full relief to plaintiff has occasioned the somewhat lax expressions which may be noticed in the cases quoted as to mental suffering. The desire is laudable, but the means suggested for its accomplishment are entirely too speculative. It is difficult to estimate by any pecuniary standard bodily pain; how much more so to weigh the sufferings of the mind, as distinct therefrom.

In the case of *Theobald v. Railway Passengers' Assurance Company*, referred to in *Pennsylvania R. R. Co. v. Allen*, just quoted, Ch. B. POLLOCK says: "A jury most certainly have a right to give compensation for bodily suffering unintentionally inflicted; but when I was at the bar I never made a claim in respect of it, for I look on it, not so much as a means of compensating the injured person, as of damaging the opposite party."

Though unacknowledged, it is not improbable that some idea of punishment to defendants prompted the first allowance of damages for bodily suffering in cases of mere negligence, as it seems impossi-

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ble to say as a bald proposition that such suffering can be compensated by money; but however the rule originated, it exists, and in these times, when traveling is so much a constituent part of living, it is perhaps practically well that it is so, for the pocket nerve is a very sensitive one, and prospect of heavy damages will undoubtedly do much to prevent carelessness on the part of passenger carriers. But evil must follow an attempt to introduce such a distinct element as that claimed in this case, which pertains so entirely to the sentimental, and opens the door to considerations absolutely imaginative and conjectural, dependent upon conditions and circumstances which seldom, if ever, could be brought within the proper province of a jury.

Such evil result has been produced, perhaps by this very cause, in Pennsylvania, where the legislature has enacted that no damages shall be recovered against railroad companies for personal injuries, except such as have been pecuniarily sustained, and then not to exceed \$3,000. Fancy damages and absurd and unjust legislation become not unnaturally correlative.

This is the first case arising in this State where it has become necessary to fix a rule of damages in actions for personal injury caused by negligence of a passenger carrier. It is well to start from the ancient landmark, and to remember that all damage to be recovered in such cases is strictly compensatory; that while it may be possible to compensate bodily pain, and so much of mental suffering as may be indivisibly connected therewith (and this rather on authority than reason), yet, that it is absolutely impossible to measure mental agony by money, and that no established rule authoritatively commands such futile attempt; and consequently it must be held that so much of the instruction given herein as allowed the jury to consider the plaintiff's pain of mind aside and distinct from his bodily suffering was error.

As to the other portion of the instruction complained of, which directed the jury to take into consideration the plaintiff's "character," it is so entirely inapt that the word must have been inadvertently used. "The character of the parties is immaterial, except in actions for slander, seduction, or the like, when it is necessarily involved in the nature of the action." 2 Greenl. Ev., § 269.

As it is impossible to determine what weight these erroneous elements had in producing the sum of the verdict, it follows that it must fall, and the district court should have granted a new trial.

Its order denying the same and the judgment herein are reversed, and the cause remanded.

CASES
IN THE
COURT
OF
ERRORS AND APPEALS
OF
NEW JERSEY.

SHIELDS, appellant, v. LOZEAR.

(84 N. J. 493.)

Lease of mortgaged premises holding over by virtue of mortgage—equity of redemption.

L. sold his premises to S., but remained in possession, under a lease from S., to expire on the 1st of April following, and took a mortgage on the premises, from S., conditioned for the payment of \$4,000, purchase-money, on or before the 1st of April, being the date of the expiration of the lease. At the expiration of the lease L. held over by virtue of the mortgage, payment of which was not tendered until after the time named, and then refused. *Held*, that a formal entry, under the mortgage, was not essential; that the unaccepted tender, after the time named for payment, did not terminate the estate of L., under the mortgage, nor extinguish the lien thereof; and that L. could not be ejected.

ACTION OF EJECTMENT. From the evidence, it appears that the defendant in this action (with his wife) conveyed a tract of land, in Warren county, to the plaintiff, on the 9th of April, 1867; the plaintiff then gave a mortgage to the defendant, bearing date April 1, 1867, conditioned for the payment of \$4,000 on or before the 1st of April, 1868. The plaintiff also executed a lease to the defend-

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ant, bearing date April 9, 1867, for said premises, for a term ending 1st of April, 1868, by which defendant covenanted to surrender the premises at said time. The mortgage was not paid at the time named in the condition, and defendant held over. A legal tender of the money secured by the mortgage was afterward made, but was not accepted, and the plaintiff then brought this action. At the trial the plaintiff, by his counsel, requested the court to find that the plaintiff was entitled to possession by virtue of the lease, which was refused. The plaintiff also requested the court to find that the tender of payment of the mortgage, although made after the time required in the condition, but before the commencement of the action, terminated the estate of the defendant and extinguished the lien of the mortgage on the land, which request was refused. The court did find the contrary of both these requests, and gave judgment for the defendant, from which the plaintiff appealed.

Jacob Vanatta, for appellant.

J. S. Shipman, for respondent.

DEPUE, J. The bills of exception sealed at the trial raised two questions: First, whether the defendant, being the tenant of premises under the plaintiff, could, at the expiration of his lease, make title under his mortgage without first yielding and surrendering the possession to the plaintiff; and, second, whether a tender by the mortgagor of the money secured by a mortgage, which is not accepted by the mortgagee, made after the day of payment named in the condition, terminates the estate of the mortgagee in the mortgaged premises, and extinguishes the lien of the mortgage on the land.

The general rule is, that a person who is in possession of premises will not be permitted to dispute the title of the landlord under whom he entered.

The facts of this case do not bring it within the principle of this rule. The deed of conveyance made by the defendant to the plaintiff, the mortgage from the latter to the former, and the lease between the parties, are all parts of the same transaction.

By the lease, the defendant became entitled to the possession of the premises until the 1st day of April, 1868, when the mortgage money became due, and the defendant became entitled to enter and

hold under his mortgage. The title of the defendant under the mortgage, as well as that under his lease, is not hostile to the plaintiff, but is in recognition of, and in subordination to, the title of the plaintiff, under which the defendant was originally admitted into possession. But the argument of the plaintiff's counsel is, that although the defendant's title under his mortgage was derived from the plaintiff, yet that the obligation of the defendant, springing from the relation of the tenancy, was first to surrender and yield up to his landlord the possession of the premises, in obedience to his covenant to surrender at the expiration of the term, before he was to be permitted to assert any possession under the mortgage. The law does not carry the fealty of the tenant to his landlord to such extent. The well-settled exceptions to the general rule aptly illustrate the non-existence of any obligation of this character.

The tenant may show that the title of the landlord has expired by the efflux of time. *England v. Slade*, 4 Johns. 682; 2 Saund. 418, note c; *Jackson v. Rowland*, 6 Wend. 666. Or that pending the term he has sold his interest. *Doe v. Watson*, 2 Star. 230; *Doe v. Edwards*, 6 C. & P. 208. Or that it has been changed by act of law, as by a sheriff's sale. *Doe v. Ashmore*, 2 Zab. 261. Or that he has mortgaged it to a third person. *Pope v. Biggs*, 9 B. & C. 245; *Watson v. Lane*, 11 Exch. 769.

The covenant to deliver possession at the expiration of the term will not estop the tenant from showing that the title of the lessor has expired. *Doe v. Seaton*, 2 Cr., M. & R. 728.

These changes in the circumstances of the landlord with respect to his title, occurring during the continuance of the tenancy, are permitted to affect his relations with his tenant, and to modify and defeat his rights as landlord, if the tenant places himself under the protection of the disturbing element, by attorning to the subsequently accruing title. This attornment the tenant may lawfully make to any mortgagee after the right of the latter to possession has accrued under the mortgage, the right of attornment to any mortgagee after the mortgage has become forfeited being excepted from the statute forbidding attornments to strangers. Nix. Dig. 294, § 14; Stat. 11 Geo. II, ch. 19, § 11.

If the position contended for be conceded, this result will follow: that if a tenant, during the continuance of his lease, obtain a new lease for the premises for an additional term, commencing at the expiration of the term of his existing lease, he cannot enter and

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hold under his new lease, or defend an action of ejectment brought against him by his landlord, unless he first surrender the possession to his landlord, and is by him re-admitted into the possession. Under such circumstances there is no cessation or interruption of the tenant's right of possession; and the effect of the two leases will be to enlarge his term until the expiration of the new lease.

By the common law, a mortgage in fee created an immediate estate in fee-simple in the mortgagee, subject to be defeated by the payment of the mortgage money on the day named in the condition, and the mortgagee might enter immediately on the mortgaged premises, and hold the estate until the condition was performed. In this State, it was held by this court that the right to enter was postponed, and the possession was in the mortgagor, until the condition was broken by default in the payment of the mortgage money. *Sanderson v. Den, ex dem Price*, 1 Zab. 646, note. With this modification of the rights of the mortgagee, as to the postponement of ability to obtain the possession of the mortgaged premises, the nature of the mortgage, as a conveyance, remains as it was at common law. By the concurrent execution and delivery of the lease and the mortgage, a leasehold interest, to continue until the 1st day of April, 1868, and a freehold estate, to take effect in possession on the day of the expiration of the lease, in default of the payment of the mortgage money, were created in the defendant.

Having been admitted into possession under the lease, a formal entry under the mortgage was not necessary to vest in him the possession under it.

The extinguishment of the lien of the mortgage, by the unaccepted tender of the mortgage money after the day named in the condition, was contended for by the plaintiff's counsel with much earnestness.

A mortgage, at common law, is a conveyance absolute in its form, granting an estate defeasible by the performance of a condition subsequent. The estate thus created was strictly an estate on condition, and in a court of law was treated as subject to be defeated only by the performance of the condition in the manner and at the time stipulated for in the defeasance. If made on condition that the conveyance should be void on payment of a definite sum of money on a given day, and the condition was performed according to its terms, the estate reverted back to the mortgagor without any reconveyance, by the simple operation of the condition. A tender

at the time and place and in the manner prescribed in the instrument itself was equivalent to performance, and operated to determine the estate of the mortgagee, and revest it in the mortgagor. Litt., § 335; Co. Litt. 207, *a*; 4 Kent, 193; Coote on Mortgages, 6; *Merritt v. Lambert*, 7 Paige, 344. But, when the condition was discharged by failure to comply with its terms, the estate of the mortgagee became absolute in law, and the title of the mortgagor was completely divested and gone, and a reconveyance was necessary to restore him to his original estate. Litt., § 332; 2 Black. Com. 158; Coote on Mortgages, 9. So inflexibly was this harsh rule of the law adhered to, that it was remarked by a learned writer, that, if the debtor had no greater mercy shown to him than a court of law will allow, the smallest want of punctuality in his payment would cause him forever to lose the estate he had pledged. Williams on Real Prop. 333. The rigor of this rule was somewhat abated by the statute of 7 Geo. II, ch. 20 (1 Evans' Statutes, 243, re-enacted in this State December 3, 1794, Nix. Dig. [4th ed.] 608), which permitted a mortgagor, when an action was brought on the bond or rejectment on the mortgage, pending the suit, to pay to the mortgagee the mortgage money, interest, and all costs expended in any suit at law or in equity; or, in case of a refusal to accept the same, to bring such money into court where such action was pending, which moneys so paid or brought into court were declared to be a satisfaction and discharge of such mortgage; and the court was required, by rule of court, to compel the mortgagee to assign, surrender, or reconvey the mortgaged premises unto the mortgagor, or to such other person as he should for that purpose nominate and appoint. In cases strictly within the terms of this statute the English courts of law have exercised an equitable jurisdiction, to enforce a redemption on payment of the mortgage debt after default in payment, according to the condition, by compelling a re-conveyance. Except in cases within this statute, the doctrine of the English courts is in accordance with the ancient common law, that at law a failure to pay at the day prescribed forfeits the estate of the mortgagor under the condition, leaving him only an equity of redemption, which chancery will lay hold of and give effect to, by compelling a reconveyance on equitable terms.

In the United States, the prevailing doctrine in courts of law, as well as in courts of equity, is to consider the mortgage as merely ancillary to the debt, and to hold that the estate of the mortgage is

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annihilated by the extinguishment of the debt secured by it, after the day of payment named in the condition. 2 Greenl. Cruise, 91, note 1; 4 Kent, 193. In fact, the latter conclusion will necessarily follow, whenever the mortgage is regarded not as a common-law conveyance on condition, but as a security for the debt, the legal estate being considered as subsisting only for that purpose. In this State this is the generally received aspect in which a mortgage is regarded, as a mere security for the debt. Per Chief Justice GREEN, in *Osborne v. Tunis*, 1 Dutch. 651; per Justice SOUTHARD, in *Montgomery v. Bruere*, 1 South. 279, whose dissenting opinion in the supreme court was adopted in the court of errors in reversing the judgment of the supreme court. 2 South. 865. Consequently, payment after the day will convert the mortgagee into a trustee of the legal estate, for the benefit of the mortgagor. In *Harrison v. Eldridge*, 2 Halst. 407, Chief Justice KINSEY, speaking of payment after the law-day, says: "When the debt is discharged according to law, the mortgagee has the legal seizin in trust for the mortgagor, and the court will never permit the trustee or those claiming under him to set up this legal estate in him or them, to defeat the possession of the *cestui que trust*. This principle is settled in *Armstrong v. Peirse*, 3 Burr. 1898. The same doctrine being applicable to all trustees, the court would not permit a recovery upon a merely formal title, when the *cestui que trust* could have compelled a reconveyance immediately, and thus have acquired the legal title." The seventh section of the act of June 7, 1799, Rev. Laws, 463; Nix. Dig. (4th ed.) 611, § 11, which authorizes satisfaction to be entered on the registry of the mortgage, in discharge of the mortgage, gives a legislative sanction to this effect of payment in the case of a mortgage which has been recorded.

But a tender, though it is equivalent to performance, where the question is whether the party is in default, is not a satisfaction or extinguishment of a debt. Tender of the mortgage debt on the day named is performance of the condition, and, by force of the terms of the condition, determines the estate of the mortgagee, and the condition being complied with, the land reverts to the mortgagor by the simple operation of the condition. The courts of the State of New York have given the same effect to a tender, without payment, after the day prescribed for payment. This doctrine was first asserted in *Jackson v. Crafts*, 18 Johns. 110, on a misapprehension of a passage from Littleton. Litt., §§ 335, 338. It was denied

by the chancellor in *Merritt v. Lambert*, 7 Paige, 344, and re-affirmed in the supreme court in *Edwards v. The Farmers' Fire Insurance and Loan Company*, 21 Wend. 467; and in the court of errors, in the same case on error, 26 id. 541; and by the supreme court in *Arnot v. Post*, 6 Hill, 65; and again denied by the court of errors in reversing the last-mentioned case. *Post v. Arnot*, 2 Denio, 344. Finally, in *Kortright v. Cady*, 21 N. Y. 343, the question was set at rest in the courts of that State by re-affirming the rule laid down in *Jackson v. Crafts*, and it seems now to be the settled law in that State that a tender of the money due upon a mortgage at any time before foreclosure discharges the lien without payment, though made after the law-day. I do not find that the rule, as finally established in the courts of New York, has been adopted by the courts of any other State. In Massachusetts the decisions have been to the contrary. *Maynard v. Hunt*, 5 Pick. 240; *Currier v. Gale*, 9 Allen, 522. In an early case in New Hampshire (*Sweet v. Horn*, 1 N. H. 332), the court held, under a statute declaring that all real estate pledged by mortgage might be redeemed by paying all costs, etc., provided such payment or performance or tender thereof be made within one year after the entry of the mortgagee for condition broken, that tender more than a year after breach of condition, where no entry had been made by the mortgagee, discharged the lands. In a subsequent case, the same court qualified the ruling of this case by denying this effect of the tender unless the money was brought into court. *Bailey v. Metcalf*, 6 N. H. 156. It may with safety be said that the doctrine of the New York courts, originating in error, and maintained against the opinion of some of the most eminent jurists that have occupied the bench of that State, is without the support of any judicial tribunal in this country; and it is impossible to perceive upon what principle of law or equity it can be rested. As already observed, tender on the day named determinates the estate of the mortgagee, because it is performance of the condition. Regarding the mortgage as remaining after default, only as a security for the debt, payment thereafter, by a necessary sequence, operates as extinguishment; the debt being the principal and the security the accessory. Whatever discharges the debt extinguishes the security. No reason, founded in principle, can be assigned for giving that effect to a tender after forfeiture. The appropriate office of a tender is to relieve the debtor from subsequently accruing interest, and the costs of enforcing, by

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a suit, the obligation which by the tender of payment he was willing to perform. The debt still remains. In the case of a common money bond, before the statute 4 Anne, ch. 16, § 12, re-enacted in this State, Nix. Dig. 631, § 9, payment after the day would not be pleaded without an acquittance by deed. 2 Saund. 48, *c*, note 1; *Rosencrantz v. Durling*, 5 Dutch. 191. The statute only applies to payments actually made, and a tender after the day cannot be pleaded. 2 Saund. 48, *b*, note 1. And if the tender is made on the day, it can only be made available by plea, accompanied by payment into court. Co. Litt. 207, *a*.

Where, as in this case, the mortgage is accompanied by a bond, to hold that a tender, after default, extinguished the mortgage, for the reason that after such default it remains only a security for the debt, will lead to the incongruity of giving to the tender an effect with respect to the security, which, by the rules of pleading and established principles of law, the court must deny in an action on the bond, which is the immediate evidence of the debt. If the form of the instrument which evidences the debt is overlooked, and the question is viewed in the aspect in which the indebtedness immediately arose, the tender does not pay or discharge the debt; and though it will avail to arrest the accruing of interest and to free the debtor from costs, it will be deprived of that efficacy by a subsequent demand and refusal. If legal analogy is to be pursued, it could lead no further than to deprive the mortgage of operation beyond the amount due when the tender was made, leaving the question of subsequently accruing interest and costs to be varied by the subsequent demand and refusal.

The instances in which a tender and refusal amount to payment, and will operate as an extinguishment, are those in which the obligation is in the nature of a gratuity, without any precedent debt or duty, and the discharge is an accidental and not a necessary consequence of the tender and refusal, there being no debt or duty remaining whereon to ground an action. 6 Bac. Abr. 456, title "Tender," etc., F. If there is a precedent debt, as a loan of money, which the debtor secures by a mortgage on his land, conditioned for payment, though by a tender made on the day the land is freed, and the feoffor may enter according to the condition, the debt is not thereby discharged, and may be recovered by action of debt. Co. Litt. 209, *a*. The effect of a tender on the day in terminating the estate of the mortgagee cannot be denied, because it is a legal

incident of his estate. Another legal incident of that estate is the extinguishment and discharge of the condition by a failure to comply with its terms. Upon this, courts of equity raised an equitable estate in the mortgagor, called an equity of redemption, which consisted in his right to have the estate of the mortgagee continued as a security for the debt, notwithstanding the default. In equity, a tender will stop the accruing of interest, and will, in some cases, cast upon the mortgagee the costs of a suit for redemption. But until the mortgagee is actually paid off by his own consent, or by the decree of the court, he retains the character of the mortgagee with all the rights incident to it. *Grugeon v. Gerrard*, 4 Younge & Coll. Exch. 119-128.

When a court of law undertakes to deal with this equitable estate, it must do so upon principles of equity, and keep in view the relief which would be afforded in equity, and protect the rights of the parties accordingly. The recognition of this equitable estate has been obtained in courts of law by the fiction of regarding the mortgagee, after his debt is satisfied, as a trustee of the legal estate for the mortgagor. Until the debt is paid, the legal seizin of the mortgagee is not a mere formal title, and no trust will be raised for the benefit of the mortgagor until the purpose for which the mortgage was made is answered.

It was stated on the argument that the money due on the mortgage was brought into court at the trial. That fact does not appear in the bills of exceptions. It is not necessary, therefore, to decide whether a court of law could enforce redemption in cases within the equity, though not within the strict letter of the statute. The English courts of law have given a strict construction to the corresponding statute of 7 Geo. II, chapter 20, and have held the circumstances of the litigation mentioned in the preamble and in the statute to be jurisdictional facts, which the court is not at liberty to disregard. *Doe v. Clifton*, 4 Ad. & El. 809; *Good-title v. No-title*, 11 Moore, 491; *Sutton v. Rawlings*, 3 Exch. 407. The statute should be strictly construed, and is not applicable to any case in which the mortgagor is himself the actor. It was designed to apply only in certain cases mentioned in its preamble and in the introductory words of the statute, and was not intended to supplant bills for redemption. The subject is one that falls peculiarly within the jurisdiction of courts of equity. The remedy there is complete by bill for a redemption, and relief may be speedily obtained by the

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exercise of the undoubted power of the court, by the writ of assistance to carry into effect its decree, by putting the mortgagor in possession, where the mortgagee has obtained possession under the mortgage. *Yates v. Humbly*, 2 Atk. 363; *Green v. Green*, 2 Simons, 399, 406; Bacon's Ordinances in Chancery, 9; *Valentine v. Teller*, Hopk. Ch. 422; *Devancene v. Devancene*, 1 Edw. Ch. 272; *Kershaw v. Thompson*, 4 Johns. Ch. 609; *Schenck v. Conover*, 2 Beas. 221; *Fackler v. Worth*, id. 395; *Thomas v. De Baum*, 1 McCarter, 37; 2 Dan. Ch. Pr. 1280.

It is not, therefore, essential to the administration of justice that courts of law should, in the absence of the imperative requirements of a statute, entertain a jurisdiction that pertains to courts of equity, in the exercise of which equities may arise that a court of law may be incompetent to deal with.

There is no error in the rulings of the court below, and the judgment should be affirmed.

For affirmance — The CHANCELLOR, BEDLE, DALRIMPLE, DEPUÉ, SOUDDER, VAN SYCKEL, CLEMENT, KENNEDY, OGDEN, VAIL. 10.

For reversal — None.

 KINNEY *et al.*, adm'rs of METTLER, appellants, v. CENTRAL R. R. Co. of NEW JERSEY.

(84 N. J. 512.)

Common carriers — Free pass — Exemption from liability.

The death of a passenger was caused by the negligence of the servants of a railroad company while he was riding on the railroad upon a free pass indorsed with the agreement that, in consideration of its receipt by the passenger, he assumed all risk of accident and injury to himself and property, whether arising from the negligence of the agents of the company, or otherwise, and that the company should not be liable under any circumstances, and, in an action by the representatives of the deceased, *held*, that the contract was valid and that no recovery could be had against the company.

ACTION to recover damages for the wrongful killing of the plaintiff's decedent by a railway company while riding on their cars. The principal fact is set forth in the opinion of the court.

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J. F. Dumont and *J. F. Randolph*, for appellants, plaintiffs in error.

J. G. Shipman and *B. Williamson*, for defendants.

VAN SYCKEL, J. The special verdict in this case finds that the decedent's death was caused by the negligence of the agents of the defendants, while the decedent was riding upon the defendants' railroad on a free pass, with the agreement that, in consideration of its receipt, he assumed all risk of accident, and that the company should not be liable under any circumstances, whether of negligence by their agents, or otherwise, for any injury to his person or loss or injury to his property while using the ticket.

The action is brought by the personal representatives of the deceased, under the act of March 3, 1848, entitled "An act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect or default," which is framed in some respects after what is called Lord CAMPBELL'S act, 9 and 10 Vic. chap. 93, and the single question to be determined is, whether the express agreement exempts the company from responsibility for the neglect of its agents. The contract is clear in its expression, made between competent parties, and, unless it contravenes some settled rule of law, or is contrary to public policy, it fully dispenses the company from liability.

Whether common carriers can, by general notices, or even by express agreement, impose upon their employees the risks incident to carriage, is not involved necessarily in this discussion. Common carriers, as a general rule, are bound to accept employment in the ordinary course of their business, and insure the safe delivery of all goods intrusted to them, and therefore their claim to evade, by special contract, the loss which considerations of public policy have imposed on them, would readily be met by objections not applicable to the case in hand. I fully agree with the able opinion of the supreme court, that the contract now under consideration was not made with the defendants in their character of common carriers. The deceased did not choose to bargain with them in their general employment, in which they hold themselves ready to transport passengers for hire, but asked and accepted from them a gratuity. To hold otherwise would be to say that a man, from the mere fact that his occupation is that of a common

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carrier, cannot, as to an individual transaction, be a gratuitous bailee.

The company, therefore, in asking immunity against loss in this case, does not seek to escape from any part of its common-law liability.

The objection that this contract is inconsistent with good morals and sound policy has been considered in all the cases of this kind which have been submitted to judicial criticism. It differs widely from the question whether a person should be allowed to stipulate against loss from his own negligence. Reasons of great cogency could be started against the validity of such a contract, which can have no pertinency to this issue.

The doctrine of *respondet superior* has not been adopted because there is any equity in imposing the loss upon the superior, but in order to induce the principal to use greater care in the selection, and to exercise increased watchfulness over the acts and conduct, of his agents.

While it may with great force be urged that the policy which dictates this rule would be infringed by permitting a railroad company, in the pursuit of its ordinary business, to contract for immunity from such loss, it is difficult to perceive how this consideration can apply to a transaction without their ordinary employment, to a mere gratuity or accommodation, which concerns none but the immediate parties to it.

Why should the passenger who solicits a free pass be permitted to escape the liability to loss which he voluntarily assumes in order to secure the accommodation? It is certainly a breach of good faith in the passenger to attempt to fix the carrier with responsibility in such case.

The suggestion that the tendency of such exemption would be to increase peril to public travel, by withdrawing one of the motives which leads the carrier to use the highest degree of care, will not bear examination.

How can it be said that non-liability for damage to an occasional free passenger might induce, in the slightest respect, a want of vigilance, which would most probably inflict untold loss upon the company?

The damage in this case resulted from the fault, not of the directors of the company, but from that of its subordinate agents, and no

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satisfactory reason has been given why the contract, which the parties themselves made, should be restrained of its full operation.

Instances in which an exemption, which cannot be distinguished in principle from this, is the subject-matter of legal contract, are afforded in the familiar cases of pre-insurance.

Upon examination of the authorities, it will be found that most of the adjudged cases sustain the view here taken. 14 How. 468; 16 id. 469; 1 Am. R. Cas. 181, note (1); 15 N. Y. 444; *Welles v. New York Central R. R.*, 26 Barb. 641; *Same v. Same*, 25 N. Y. 442; 26 Eng. Law & Eq. 443; *Perkins v. New York Central R. R.*, 24 N. Y. 196; *The Indiana Central R. R. v. Mundy*, 21 Ind. 48; *Illinois Central R. R. v. Read*, 37 Ill. 484.

It is not necessary to criticise these cases, but the reports show that, while the rule now applied has been generally adopted, much of the discussion in them turned upon the questions: 1. Whether the passenger was riding gratuitously. 2. Whether the liability attached where there was gross negligence or willful misfeasance.

It is very difficult to fix the degrees of negligence by legal definitions, to say "how much care will relieve a party from the imputation of gross negligence, or what acts or omissions will charge him with it;" and it is doubted by Justice CURTIS, in the case referred to in 10 Howard, whether the terms "slight," "ordinary" and "gross negligence" can be usefully applied in practice.

It may well be doubted whether the existence of a greater or less degree of negligence is important in its legal effect, except so far as it may be evidence of bad faith.

The case before the court is not burdened with any consideration of the degrees of negligence. The jury found negligence in the agents of the company, which, in the absence of proof to the contrary, must be presumed to be ordinary negligence.

In the case of *The Pennsylvania Railroad Co. v. Henderson*, reported in 51 Penn. St. 315, the supreme court of Pennsylvania has taken a different view of the law, but in that case the passenger was riding on what is called a drovers' pass, which the court held not to be a gratuitous pass, and treated the contract as that of a common carrier, attempting to limit his liability, by special agreement, with a paying passenger.

It is too late to raise the question with regard to the want of a stamp on the contract indorsed on the free ticket; that defect, if it

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could avail the plaintiff at all, must have been insisted on when the instrument was offered in evidence.

The result is, that the case made furnished a full defense to the company, and the judgment of the supreme court must, therefore, be affirmed.

Affirmed.

For affirmance — CLEMENT, DALRIMPLE, KENNEDY, OGDEN, OLDEN, SCUDDER, VAN SYCKLE, WALES. — 8.

For reversal — None.

 STEVENS V. PATERSON AND NEWARK R. R. Co., appellants.

(24 N. J. 532.)

Title to soil below high-water mark — rights of riparian owners — construction of railroad charter.

A railroad company, in pursuance of alleged franchises embraced in their charter, constructed their track along the bank of a navigable river, below high-water mark, thus cutting off, without compensation, the riparian owners from the benefits incident to their property from its contiguity to the water. *Held*, that the title of owners of lands bordering on tide waters ends at high water mark; that below the ordinary high-water mark the title to the soil is in the State; and that the riparian owner has no rights beyond high-water mark, as against the State or its grantees.

The question whether the legislature intended to grant the right of building a railroad on soil situate below high-water mark will be determined by an inspection of the charter. A specific grant is necessary to convey such right.

ACTION on the case against a railroad company for building a railroad on the water front of plaintiff's land, thus depriving him of the benefits incident to undisturbed possession. The plaintiff was the owner of land adjacent to the Passaic river, which river is navigable and subject to the flow and ebb of tide. The railroad was constructed along the line of plaintiff's land below high-water mark. The defendant pleaded their charter in support of their right to do the act complained of. The provision in the charter, which is claimed to substantiate their right, is as follows:

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“That it shall be lawful to lay out, construct and run their railroad along the Passaic river, from the village of Belleville to any point in the city of Newark, at or near Gouverneur street, and to acquire the rights of the shore-owners in the manner prescribed in the charter of said company in other cases, and may extend said road over said river, and for that purpose may construct and maintain a bridge, from some convenient point in the city of Newark, at or near Gouverneur street, to a convenient point on the east side of said river, in the county of Hudson, and with a draw of the width of sixty feet, to be located at a point convenient for navigation in said river; said bridge shall be constructed with a suitable passage-way or walk, for the accommodation of persons crossing the river; and the said Patterson and Newark Railroad Company may continue said railroad at the distance of not less than one hundred and fifty feet eastwardly at the river road or highway, and connect the same with any other railroad or railroads on the east side of said river, on such terms as may be agreed to, and may lay out and construct the same, passing under or over the Morris and Essex Railroad by a suitable bridge or arched passage-way; *provided*, that in passing by the lands of the Mount Pleasant Cemetery the said railroad shall not encroach upon the lands thereof which are used for burial purposes in said cemetery, but the said railroad shall be constructed entirely outside and to the east of the present stone wall embankment of the cemetery grounds, and near the line of high water in said Passaic river; and, before entering upon said lands, the said railroad company shall enter into an agreement with the Mount Pleasant Cemetery Company to construct a suitable stone wall, not less than six feet high, on the line between said railroad and the cemetery grounds.”

Judgment was rendered for the plaintiff, from which defendants appealed.

Parker & Keasbey, for plaintiff in error.

Abeel, Frelinghuysen & Vanatta, for defendants.

Attorney-General Gilchrist, for the State.

BEASLEY, C. J. The principal question which has been argued in this case is that respecting the interest of the State in the lands lying between high and low-water marks in tidal rivers. In some

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of its aspects this subject is a familiar one to our courts; but, on this occasion, the point is, for the first time, distinctly presented, whether it is competent for the legislature to grant the soil under the water, so as to cut off the riparian owner from the benefits incident to his property from its contiguity to the water.

Notwithstanding the apparent skepticism of counsel upon the subject, I am constrained to think that some of the matters which were handled in the discussion before the court are to be considered as at rest. In my opinion, it is entirely indisputable that the proprietors of New Jersey did not, under the grant from the Duke of York, take any property in the soil of navigable rivers within the ebb and flow of the tides. This was the very point of decision in *Arnold v. Mundy*, 1 Halst. 1; *Martin v. Waddell*, 16 Pet. 367; and *Den. ex dem of Russell v. The Associates of Jersey City*, 15 How. 426.

Second, that this title to the soil under navigable waters, which the common law of England placed in the king, was transferred by the revolution to the people of this State. The cases above cited completely establish this proposition.

And, lastly, in the case of *Gough v. Bell*, 2 Zab. 441, it was declared that the owner of lands along the shore of tide waters could extend his improvements by wharves and filling up over the shore in front of his lands to low-water mark, unless prevented by the State, provided he did it so as not to interfere injuriously with navigation.

Thus far I regard the law in this State as founded in adjudication, which ought not to be questioned, and which cannot be disturbed. Assuming, then, as I do, the foregoing propositions as data in the discussion now before the court, the point of inquiry is narrowed to the single question which was regarded as left open in the case last cited, viz.: whether the owner of lands on tide water has such a right to the use of the water that the State cannot authorize any improvements in front of his lands, which will destroy or abridge that right, without compensation.

In the discussion of this topic, I will consider briefly, first, the right, so-called, of the riparian proprietor; and, in the second place, the rights of the State over the sea shore.

First, then, with regard to the rights of the owner of the upland. In the case of *Gough v. Bell*, in this court, I observe that Mr. Justice NEVINS and Mr. Justice POTTS put their opinion on the ground

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that the riparian owner, at common law, was invested with certain rights in the water as appurtenant to his estate. And in the case of *Gould v. The Hudson River Railroad Company*, 2 Seld. 544, Mr. Justice EDMONDS, in a dissenting opinion, expresses a similar view.

I have not found that any other judge has ever based a decision on such a ground. The theory on which those opinions are founded seems to me the result of misconception. "The riparian proprietor has a right," says Mr. Justice POTTS, "though his strict legal title is bounded by the high-water line, to the water as appurtenant to the upland; a right of towing on the banks, of landing, lading and unlading; a right of way to the shore; a right to draw seines upon the upland, and of erecting fishing huts. He has the right of fishery, of ferry, and every other which is properly appendant to the owner of the soil; and he holds every one of these by as sacred a tenure as he holds the land from which they emanate." The error in this statement arises from overlooking the fact that some of the rights enumerated belong to the riparian proprietor as a member of the community, and that others of them belong to him in his character of owner of the soil. Not one of the privileges in the water which are ascribed to him emanate from his ownership of the land. In common with every other citizen, he can fish in the water, and pass and repass to and from the water along the shore. But he has not these rights by virtue of his property; they attach to him as an individual, and he holds them in common with other citizens. They are part *rerum communium*. Then, again, it is true, it is lawful for him to land on the bank, and to dry his nets and to build fishing huts there. But the right to do these things, and which are not privileges in the water, appertain to him in the ordinary way as the owner of the land.

The case is merely this: The man who owns the land next to navigable water is more conveniently situated for the enjoyment of the public easement than the rest of the community. But a mere enumeration of the advantages of that position falls far short of showing that such proprietor has, in the *jus publicum*, by the common law, more or higher rights than others. It will be observed that in the sentences above quoted, it is averred that the rights referred to emanate from the ownership of the soil; this is certainly true as to certain of them, such as the right to erect fishing huts, etc., but with respect to the usufruct of the water being appendant to the land, in any legal sense whatever, that is the point to be

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proved, and it is simply assumed. The question is one of mere tradition, precedent, and ancient authority. When and by whom was it ever claimed, from the days of Bracton to the present time, that the ownership of the upland drew to it any rights in the sea shore, or peculiar uses of the water? In the opinion commented on, no common-law authority is cited, and the few American cases referred to are so manifestly misapplied that it is not necessary to subject them to criticism. My examination has been so thorough that I feel confidence in saying that none of the ancient authorities can be found — and they, of necessity, must be our guides in this inquiry — which give countenance to the notion that any such privileges as those claimed are appurtenant to the bank or *ripa* of navigable water. Indeed, so far has the bank owner been from making claim to any peculiar privileges of this kind, that the reverse has occurred, and the contested question has been, whether his land, for the convenience of the public, was not subject to certain servitudes; whether such land might not be crossed in going to and returning from the water; whether the right to tow boats along the bank or to land, or to dry nets upon it, was not a public right incident to the use of the water. These and similar questions have been mooted in the courts, some of which remain unsolved to the present day, while others have been decided, though not without hesitation and difficulty, in favor of the riparian proprietor. In all these controversies, extending from ancient through modern times, I do not find that it was ever even suggested that, as an incident to his estate, the owner of the *terra firma* along the line of tide water was possessed of any peculiar privileges, with the exception of those of alluvion and dereliction — privileges which are, perhaps, countervailed by the loss to which he is subject from the washing away of his land. That this is the true position of the land-owner at the common law will, I think, more clearly appear when I come to set forth the rights of the king in the sea shore, to which subject I now proceed.

The language of the old books is, “that the sea is the king’s proper inheritance,” and he is styled “the lord of the great waste,” “*iam aquæ quam soli.*” Co. Litt. 107, 260, *b*; Colles, 17; 3 Leo, 75; 2 Molloy, 375.

And this was property susceptible of transference. There are some antique instances of grants by the kings of England of certain portions of land under the sea. Lord HALE recites several transfers

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of this description. *Hale, de jure maris*, 14-28. It is true that such conveyances, at least in modern times, did not pass the property disincumbered of the public right of navigation and fishing; but still it is clear that the tenure of the soil carried with it certain valuable rights. In fact it appears to have been possessed of the ordinary incidents of property on *terra firma*. It could be put to any use not inconsistent with the public easements with which it was burdened. If it was unlawfully appropriated or interfered with, the law afforded it protection. There are cases, both ancient and modern, showing that this *districtus maris*—this land covered with water—was a property susceptible of valuable uses. Thus, in the celebrated case of *The Royal Fishery in the Banne*, Davies, 149, it is said: "The city of London, by a charter from the king, hath the river Thames granted to them, but, because it was conceived that the soil and ground of the river did not pass by that grant, they purchased another charter, by which the king granted to them *solum et fundum* of the said river; by force of which grant the city to this day receives rents of those who fix posts, or make wharves or other edifices on the soil of said river." It cannot fail to be observed how entirely this case explodes the assumption that the riparian proprietor has any common-law right to extend his front, either by filling in or by the erection of a wharf. Such acts would have been trespasses on the private property of the sovereign.

The modern case illustrative of the same subject, to which I will particularly refer, is that of *The Attorney-General v. Chambers*, 11 De Gex, M. & G., 206. This was an information against certain owners and lessees of a district abutting on the sea shore. The information alleged that, by the royal prerogative, the sea shore and the soil, and all mines and minerals lying under the sea, and all profits arising therefrom, belong to her majesty, etc.; that there were very valuable veins or strata of coal lying under that part of said district which was contiguous to the sea shore; that the sea shore vested in her majesty extended landwards as far as high-water mark in ordinary spring tides, or, at all events, far beyond high-water mark at neap tides; and that the defendants had encroached upon and worked valuable mines under the shore. The general right of the queen, as stated, was admitted, the only question which was put in controversy being as to the extent of such right. A verdict was taken, by consent, for the crown, and the court decided that the right of her majesty to the sea shore landwards is, *prima*

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facie, limited by the line of the medium high tide between the spring and neap tides. This decision was made in the year 1854.

From these two cases it seems to me most conspicuous that the ownership of the shore under the sea drew to it all the usual rights of property. It could be leased out for wharves or worked as a coal mine. We are also to bear in mind that the sea shore could be granted in gross—that is, without being parcel of the upland. Hall on the Rights of the Crown, etc., p. 19. I also refer, for a number of examples in which claims of the crown similar to the foregoing have been successfully enforced, to an article in vol. 6, p. 99, of the Law Magazine and Law Review. From this essay it appears that “the advisers of the crown, for the last quarter of a century, have exercised unusual vigilance respecting, and been most active in realizing, the royal claim to the fore shores.”

Among other notable instances the following one is thus described: “An earlier case was one of an information for intrusion, filed in 1833, by Sir WILLIAM HOME, when attorney-general, in the court of exchequer, to establish the right of the crown to a tract of land containing about two hundred and seventy acres, formerly overflowed by the tide, situate near the city of Chester, on the south bank of the Dee, a tidal navigable river. The suit terminated in favor of the crown, and the land was subsequently sold by the crown.” Nor do I find the royal right anywhere, in the long line of adjudications upon the subject, called in question with respect to its general features. It is admitted, in the fullest extent, in the conspicuous modern cases. *Lord Advocate v. Sinclair of Foss*, L. R., 1 Scotch Appeals, 174; and *Gann v. The Free Fisheries of Whitstable*, 11 House of Lords’ Cases, 192.

Indeed, I think it is safe to say that no English lawyer, speaking either from the bench or bar, has ever asserted that the owner of the land along the shore of navigable water has any peculiar right, by reason of such property, to the use of the water or of the shore. And it seems entirely incredible to suppose that such a right as this could have existed, and that no allusion should have ever been made to it. It is obvious that many of the controversies which have been before the courts would have been largely affected by the existence of such a right. Such would have been the effect in the case of *The Duke of Buccleuch v. The Metropolitan Board of Works*, the report of which has come to hand since the argument on the present occasion. L. R., 5 Exch 221. The

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facts of the case are thus stated: "The Duke of Buccleuch, the plaintiff, had a certain interest under a lease and two agreements from the crown in a mansion in Parliament street, the back of which was parallel to, and bounded by, the river Thames; and the metropolitan board of works, the defendants, had constructed, by force of an act of parliament, an embankment between the back of the plaintiff's premises and the river. For the purpose of this construction the board of works had found it necessary to remove the area or mass of water which formerly used to run at the back of the premises between high and low-water mark, and also to take away a causeway or jetty running from the foot of some stairs on the plaintiff's land across the shore to low-water mark. It will be observed that the facts of this case were, in all essential particulars, the same as those embraced in the one now before this court, with the exception that in the reported case the plaintiff had a jetty in controversy extending from his land to low-water mark. The act under which the defendants had erected their embankment required, where land was taken, compensation to be made, and directed that in estimating 'the purchase-money or compensation to be paid by the promoters,' regard should be had 'not only to the value of the land to be purchased, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers,'" etc. The plaintiff's claim for compensation was two-fold: first, for the destruction of the jetty or landing place; and second, for the taking away of the water which used to flow along the river side of the premises. The court held that the only damages the plaintiff was entitled to were those resulting from the destruction of the jetty or landing place; but that the general damage occasioned by the interposition of the embankment of the defendants along the water front of the premises were *damna absque injuria*. This was regarded as a case of great importance, and was fully argued and considered, and yet it was not intimated, either by counsel or any of the judges, that the plaintiff, as riparian proprietor, had any right, the deprivation of which was a legal injury or afforded even any just ground for complaint. In the whole case there is not a hint of the supposed existence of such a right.

From these authorities and many others which might be cited, it appears to me to be plain that, by the rules of the ancient law,

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the owner of land along the shore was entitled to no right as an incident of such ownership, except the contingent ones before referred to of alluvion and dereliction; and that, on the other hand, the title to the soil under tide water was in the sovereign; and that such title was attended with the usual concomitants of the ownership of realty. And it consequently followed from this result, that, in order to enable the owner of the upland to fill in or wharf out below the line of high water, it was absolutely necessary to adopt some principle different from those of the common law. And this, as I understand, was the foundation on which the majority in this court placed themselves in the decision of the case of *Gough v. Bell*. That final decision was a concurrence in the view expressed by Chief Justice GREEN, in his opinion delivered in the supreme court; and that view was, as I apprehend, the only one which could invest the claim of the land-owner to extend his lands by artificial means below the line of high water, with the faintest semblance of legality. As such claim could not rest on the common law, it was indispensable to invoke and sanction a custom or local usage variant from the common law. How far such a custom, as a mode of acquiring a title to real estate, can be made to harmonize with legal principles, it is not necessary to inquire, for, as before remarked, I consider the existence and legality of such a usage to be *res adjudicata* in this State. Admitting its legal existence, then, the inquiry presses as to its effect in law. It confers a right, by the legal exercise of which the bank-owner may encroach on the public property between high and low-water marks. If such a right existed by force of the common law, as an incident of property, it is obvious it could not be destroyed or substantially impaired by the legislative power, without compensation. The question is, whether this customary right has the same quality and efficiency as though it appertained to the land by force of the common law.

My consideration of this branch of the subject has led to the conviction that such privilege has not the effect suggested in the above inquiry. The local custom in question was nothing more than a license on the part of the public to the land-owner, enabling the latter to fill in or wharf out along the fore shore, between high and low-water marks, and which license, when executed, became irrevocable. The shore-owner acquired his indefeasible right by the acquiescence of the public in the performance of the act. That this was the view of the judges, whose opinions prevailed in the decision

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of *Gough v. Bell*, is, I think, clearly manifest. I have above observed that the true doctrine, with respect to this local custom, is embodied in the opinion read in the supreme court by Chief Justice GREEN. In that opinion, this clear statement, with respect to the necessity of the execution of the license, as a pre-requisite to the acquisition of a legal right on the part of the land-owner, is to be found, viz.: "In New Jersey, as we have seen, the title of the State extends, as at common law, to high-water mark as it actually exists. Where the waters have receded by alluvion, or by the labor of the adjoining proprietor, the title of the State does not extend beyond the actual high-water line. That every encroachment upon the shore or other part of the public domain may, at all times, be restricted or controlled by the legislature, is admitted. That any erection prejudicial to the common rights of navigation or fishery may be abated, is not denied. But, in the absence of such legislative restriction, where no nuisance is created, the riparian proprietor may appropriate the shore between high and low-water mark to his own use." This language is too clear and explicit to need explanatory comment. That the local custom of the State, which was recognized and enforced by the court, operated as a simple license to the riparian owner to enlarge his possessions at the expense of the public domain, and which license was revocable at any time before execution, is the clear doctrine of the adjudication in question. It has no reach beyond this. And from that time to the present, I do not perceive that the judiciary of this State have been in any doubt upon this subject. Whenever the doctrine has been referred to, the question has been treated as being entirely at rest. In the year 1856, in the case of *The State v. The Mayor and Common Council of Jersey City*, 1 Dutch. 525, certain lands lying under the flow of the tide were thrown out of a tax assessment, for the reason that the title to such lands was in the State, and Mr. Justice ELMER, with characteristic directness of expression, defines the public title thus: "It must now be accepted, as the established law in New Jersey, that the right of the owner of lands bounding on a navigable river extends only to the actual high-water mark, and that all below that mark belongs to the State. The inchoate right, if such it may be called, which the proprietor of the upland has, either with or without a license, to acquire an exclusive right to the property, by wharfing out or otherwise improving the same, gives him no property in the land while it remains under the water. It may be granted, by

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the State, to a stranger at any time before it is actually reclaimed and annexed to the upland. Such is, unquestionably, the common law, and I am aware of no alteration of it in this respect in New Jersey." In this opinion Chief Justice GREEN, and Justices OGDEN and HAINES concurred. Again, after an interval of several years, the rule was treated by the same court as established. I refer to the case of *Stewart v. Fitch and Boynton*, 2 Vroom. 18. This was a suit, by a riparian owner, for the use of certain flats by the rafts and lumber of the defendants, and, among other reasons given for dissent to the legality of the plaintiff's claim, the court said: "But it also appears that the flats on which the rafts were anchored were all below high-water mark; and, at high tide, covered to the depth of two feet, and that no part had been in anywise improved or reclaimed, and that, consequently, the title to them was not in the plaintiff, but in the State of New Jersey."

From these cases, I think it is evident that, from the date of the decision of *Gough v. Bell* up to the time of the present controversy, the question now under consideration has not been considered an open one by the courts of this State. And such, too, appears to have been the legislative and public understanding of the effect of this leading decision just mentioned, at the time that it was rendered. This, I think, is manifest from the provisions of the act of 1851, entitled "An act to authorize the owner of lands upon tide waters to build wharves in front of the same." Nix. Dig. 1025. By the first section of this act it is declared "that it shall be lawful for the owner of lands situate along or upon tide waters to build docks or wharves upon the shore in front of his lands, and in any other way to improve the same, and, when so built upon or improved, to appropriate the same to his own exclusive use." Thus we find in this provision, and in similar provisions in many other laws, the local custom sanctioned in the case of *Gough v. Bell* assuming a statutory form and subject to certain general regulations. The right of the bank owner was dealt with by the legislature not as an incident of property already vested, but as a privilege which required the element of public acquiescence, and the performance of a prerequisite on the side of the proprietor, to be converted into a legal right. Nor should it fail to be observed that, even if we were to admit the indefeasibility of this customary right of the shore owner, such concession could not have much effect in securing him against the exercise of legislative power. By force of such a doctrine, the

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land lying between the high and low-water lines could not be taken from him without compensation ; but below the low-water line, the public right and control would be still absolute. But I have said such concession cannot be made. The bank owner has, by the local custom of the State, but an inchoate right before the reclamation of the land below the water ; nor does he gain any thing in this respect by the statute just referred to. That act did not add any thing to the efficacy of the local custom as a mode of acquiring title. It left that right as it found it—a pure license, revocable before execution. Such acts, bearing the form of legislative licenses, are not uncommon, and their effect has been clearly defined. It has never been thought that the privileges conferred by them were vested rights in the sense of debarring the public from revoking them at pleasure. Two cases in point, which have arisen in Pennsylvania, I will refer to as illustrative of the principle. By a statute of that State, all persons owning lands adjoining navigable streams were authorized to erect dams in such streams, and appropriate the water to the uses of their mills. In the cases of *The Susquehanna Canal Co. v. Wright*, 9 Watts & Serg. 9 ; and *The New York and Erie Railway v. Young*, 32 Penn. 175, it was declared that the rights acquired under this act were not indefeasible, but were subordinate to the rights of the commonwealth. This result was justified by the theory that such licensees took their privileges under the implied condition that they should be held in subordination to the requirements of the public. These decisions go to the point that a legislative permission to appropriate to individual use a part of the *jus publicum*, does not, *per se*, deprive the public of a right to resume the privilege granted, unless it appears that it was the intention to vest such privilege irrevocably in the licensee. The wharf act of this State clearly leaves, in this respect, nothing in doubt, for it expressly announces that after the riparian proprietor has, in point of fact, erected his wharf or made any other improvement below the high-water line, then, and not till then, the land so appropriated shall become his own. Prior to this event, he has no rights in the water or the land under it, either by the statute or by the local custom, which are not subservient to the legislative will.

The steps which I have thus far taken have led me to this position : that all navigable waters, within the territorial limits of the State, and the soil under such waters, belong, in actual propriety, to the public ; that the riparian owner, by the common law, has no

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peculiar rights in this public domain as incidents of his estate; and that the privileges he possesses, by the local custom, or by force of the wharf act, to acquire such rights, can, before possession has been taken, be regulated or revoked at the will of the legislature. The result is, that there is no legal obstacle to a grant, by the legislature, to the defendants, of that part of the property of the public which lies in front of the lands of the plaintiff, and which is below high-water mark. It may be true that, by such an appropriation, the plaintiff will sustain a greater inconvenience than will other citizens whose land does not run along this river. But the injury to all is, in its essence and character, the same, the difference being only in degree. All persons who have occasion to approach this river, over that part of the bank occupied by the railroad of the defendants, may, perhaps, experience some inconvenience from the interposition of such works; the railroad, therefore, is somewhat of an impediment to the public rights of fishery and navigation. But no one, it is presumed, will pretend that such impediment is, on that account, illegal, if authorized by the legislative authority. Nor can the plaintiff complain because a difficult access to the water is a greater hardship to him, owing to the easy use of the water, in connection with his property in its natural condition, than it is to those who live at a distance from it. If it were true that no public improvement can be made which, in its execution, will affect the property of one citizen more injuriously than it will that of another, many of the greatest works of the times would become impossible. No railroad or canal can be constructed which will not greatly benefit the lands of some persons, and injure, almost as greatly, those of others. Every citizen is required, at times, to contribute something, by way of sacrifice, to the public good. Such partial evils is the price which is paid for the advantages incident to the social state. It is not necessary to refer extensively to authorities in confirmation of the doctrine that, as a general rule, the public domain is subject altogether to the control of the legislature, and that incidental damage resulting to individuals, from the exercise of such control, gives no legal claim to compensation. The principle seems universally conceded that, unless in certain particulars protected by the Federal constitution, the public rights in navigable rivers can, to any extent, be modified or absolutely destroyed by statute. By force of the constitution of this State, private property cannot be taken, even for public use, without just compensation. But the

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domain of the legislature over the *jura publica* appears to be unlimited. By this power they can be regulated, abridged or vacated. We have seen that, by the common law, the king was the proprietor of the soil under the navigable water, and this being regarded as a private emolument of the crown, was susceptible of transfer to a subject. But such transfer did not divest or diminish, at least after *Magna Charter*, the public rights in the water and consequently the grantee of the crown held the property in subjection to the common privilege of fishery and navigation. The consequence was, that the king could not deprive the subjects of the realm of these general rights. This was a power that resided in parliament, and not in the monarch. But that such a parliamentary power existed, appears never to have been questioned by any English authority, nor do I perceive that its exercise was ever regarded as a legal wrong, or even as an unusual hardship to the owner of the land along the shore. In the year 1780, this authority of parliament to put to use the land under tide water, thus intercepting the landowner, was fully recognized by Lord MANSFIELD. The case referred to is that of *The King v. Smith*, Doug. 441. The city of London, under an act in the time of George III, had erected piles on the bed of the Thames, near Richmond, within high-water mark, about the distance of twenty-nine feet from the shore, for the purpose of making a towing-path for horses, adjoining and contiguous to a wharf in the possession and property of the defendants, or of those under whom they claimed. The defendants cut down one of these piles, which was proved to have been erected between the high and low-water marks, opposite to the said wharf. For this act an indictment was found, and the defendants were convicted. The case came before the court on a motion to arrest judgment. In the argument of this case none of the distinguished counsel employed for the defense questioned the right of parliament to appropriate the land in question, in the manner specified, if the Thames, at the point in question, was within the reach of the tide, the entire predication being that such was not the fact. The conviction was sustained. I think the power of parliament, in affairs of this character, is not to be denied. Nor was this one of those severe prerogatives which existed only in consequence of the theoretic omnipotence of the legislative branch of the British government.

Whatever the theory, we know what the practice has been, and it is scarcely too much to say that, since the days of the revolution.

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no instance can be found of any Englishman being deprived of any right of property by act of parliament. A statute putting to use the land under tide water was regarded as legitimate — not because the power of parliament was unlimited, but because the control over the public domain was unlimited. And, in fact, the absence of a power to control and put to use the public interests in the navigable waters would be an imperfection in the civil polity of any people. I do not find that it has ever been supposed that such a power did not exist in any of the American States. By a statute of the State of Delaware, a citizen was authorized, for the purpose of improving his lands, to close the mouth of a navigable creek, and such statute was pronounced to be constitutional, and the act done under it legal, by the supreme court of the United States. *Wilson v. Blackbird Creek*, 2 Pet. 245. In *Glover v. Powell*, 2 Stockt. 211, a similar law was enforced, and in the case of *The Mayor of Georgetown v. The Alexandria Canal Co.*, 12 Pet. 91, it was held competent for congress, acting as the local legislature, to authorize the erection of the canal in question, although the same was admittedly injurious to the interests of the riparian owners. This same doctrine was enforced in the case of *Gould v. Hudson R. R. Co.*, 12 Barb. 616; 2 Seld. 522, on a scale of the greatest magnitude, the road of the defendants being located along the Hudson, and intervening for many miles between the water and the land of the bank-owners. See a collection of cases to the same effect, in Angell on Tide Waters, 92–108. It is upon this principle that water, in large quantities, is taken from our rivers to feed our canals, and that dams are placed, to the destruction of navigation, in our rivers for the use of manufactories. Our State affords many instances of a display of this power in this form.

With regard to the hardships oftentimes incident to the exercise of such a power, the courts can have no concern. Such considerations address themselves exclusively to the law-makers. It is the office of the court to declare, if the law leads to such results, that the legislature has the authority to regulate or destroy at its pleasure, and for the common welfare, the public rights in navigable rivers, and that if individuals are, in consequence thereof, incidentally injured, such loss is *damnum absque injuria*. If compensation be made for such damage, it is on the part of the State a mere gratuity, for neither the riparian proprietor nor any other citizen whose property has been impaired can claim such redress as

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a matter of legal right. In all such cases the appeal must be to the sense of justice of the legislature.

The result being that the legislature can authorize the laying of this road in front of the land of the plaintiff without compensation, the next question is, has such a privilege been conferred on the defendants?

The claim is, that the legislature has granted to these defendants the use of a part of the public domain. The State is never presumed to have parted with any part of its property, in the absence of conclusive proof of an intention to do so. Such proof must exist, either in express terms or in necessary implications. I shall not cite authorities to sustain so familiar a proposition. With respect to this statute now drawn in question, and by the supposed force of which the defendants have erected their works, I fully concur in the view expressed by Mr. Justice DEPUE, in the opinion read by him in the circuit court. I think there are no terms used in this statute, which, fairly interpreted, imply an intention to confer on the defendants the privilege asserted, nor does such privilege necessarily result from the general powers conferred. This plea, therefore, presents no bar to the action of the plaintiff.

With respect to the question raised in the argument, touching the sufficiency of the facts stated in the plaintiff's declaration to sustain his suit, I will merely say that it seems to me that a legal cause of action is shown.

The substantial allegation is, that in consequence of the works of the defendants, he is prevented from passing from his land to the river Passaic, which, at present, is a public highway.

Now it is true that, as the defendants have put these obstructions in this river without authority of law, such obstructions are a public nuisance. But I think it is a nuisance which, according to the allegations on the record, inflicts a peculiar damage on the plaintiff, and, if that be so, it is admitted this action is well brought. The plaintiff, until the State interferes and deprives him of the privilege, has the right to pass directly from his property on the shore of this navigable river. He has been deprived of the right by the tort of the defendants, and this is a damage which, apparently, is individual and peculiar to himself. If a ditch should be dug in a public highway, in front of the door of a dwelling-house, so as to cut off access to and from such house, no one would doubt that the occupier of such house sustained a greater inconvenience from

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the public nuisance than the body of the community. The character of the present tort, as it respects the plaintiff, is precisely of this nature. I think the facts stated support the action.

The judgment in the circuit court should be affirmed.

The chancellor delivered an elaborate opinion for reversal.

It was thereupon ordered by the court that the vote be taken separately on the two points involved.

The first of those questions was, whether the legislature had the power to grant to the defendants in error (in the court below) the use of the premises in question, being lands in a navigable river below high water-mark.

In order to express, with precision, the views of the members of the court, it was determined that those who voted in the affirmative on this first point should express a concurrence in the view contained in the opinion of the chief justice, and those voting in the negative, in the view contained in the opinion of the chancellor.

The vote was then taken on this first point in this mode, and resulted as follows, viz:

For concurrence with the chief justice—The CHIEF JUSTICE, Justices BEDLE, SCUDDER, VAN SYCKEL and WOODHULL, Judges KENNEDY, OLDEN, VAIL and WALES.—9.

For concurrence with the chancellor—The CHANCELLOR, and Judges CLEMENT and OGDEN.—3.

The second question was then put, which was, whether the legislature had, in point of fact, granted to the plaintiffs in error the right to the use of the premises in question; those members who denied the existence of such grant voting to affirm, those of a contrary opinion to reverse.

The vote resulted as follows:

For affirmance—The CHANCELLOR, the CHIEF JUSTICE, Justices BEDLE, DALRIMPLE, SCUDDER, VAN SYCKEL, WOODHULL, Judges CLEMENT, OGDEN, OLDEN, VAIL, WALES.—12.

For reversal—Judge KENNEDY.—1.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

**KENTUCKY FARMERS' MUTUAL INSURANCE COMPANY, appellants,
v. MATHERS, ETC.**

(7 Bush. 22.)

*Insurance policy—lien on property insured for premium—effect of sale of
property to bona fide purchaser.*

A member of a mutual insurance company held a policy on buildings and property containing a provision that the buildings insured and the land on which they stood became pledged, by the insurance, to the company, and that the company should have a lien thereon for the premium. The insured died in debt for the premium having devised the property insured, with the land, to his widow, who conveyed it to Mathers, the latter not having notice of the lien of the insurance company. *Held*, that the lien of the policy could not be enforced after the property had passed into the hands of a *bona fide* purchaser.

ACTION to enforce an alleged lien on a tract of land and building thereon. The facts are set forth in the opinion of the court.

L. S. Hardin, for appellant.

Samuel Russell, for appellee.

HARDIN, J. The Kentucky Farmers' Mutual Insurance Company, a corporation of which the late John H. Harney was a member at the time of his death, brought this suit in equity for the purpose of enforcing an alleged lien on a tract of land and building thereon.

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which were devised by said Harney to his widow, and sold and conveyed by her to John G. Mathers; the building and property of Harney having been insured by the plaintiff, for which he was indebted at his death in several sums assessed against him by the corporation, according to its charter and the terms of Harney's contract of insurance.

A demurror of Mathers to the petition was sustained and the action dismissed; and this appeal is prosecuted to reverse that judgment.

By the charter of the corporation the policy of Harney was rendered void, or at least voidable, at the option of the company, by the alienation of the property to Mathers. Acts of 1857, 1858; *Baer v. The Phoenix Insurance Co.*, 4 Bush. 242. And the charter, besides imposing on each member of the corporation an obligation to pay his portion of its losses and expenses, provides as follows: "All buildings insured by and with said company, together with the right, title and interest of the assured to the lands on which they stand, shall be pledged to the company, and the company shall have a lien thereon against the assured during the continuance of his or her policies."

If it be conceded, as we think it ought, that the provision of the charter declaring the policies of the company *void* upon the alienation of the property insured, except in particular contingencies, means only that they may thereby become void where the right of exoneration is not waived by the insurer, and not at all events to become absolute nullities as to both parties; and if it be further conceded that the position of Mathers was that of a mere volunteer, or even an ordinary purchaser, with notice of the lien of the company, he should be treated as having accepted the title of Harney *cum onere*, and under an implied trust for the satisfaction of the debt. Yet the important question remains to be determined, whether a sale and conveyance of property insured to a *bona fide* purchaser, without notice, does not destroy the lien of the insurance company for the payment of the premium note of the vendor or previous owner. It is worthy of consideration that, while the lien given by the charter relates by its terms only to the person insured, there is nothing in the charter from which we can infer that it was designed that the lien should operate against a subsequent purchaser, unless he should choose to continue the policy by taking an assignment of it in the manner prescribed. And the omission of the legislature.

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to make any provision for giving notice to the public, by registration or otherwise, of the existence of the liens attaching to property, under said act of incorporation, upon the execution of private contracts of insurance, is an argument that it did not design to extend the lien to *bona fide* purchasers of insured property.

In the case of *McCulloch and others v. The Indiana Mutual Fire Insurance Co.*, 8 Blackf. 50, bearing a strong analogy to this so far as essential to this inquiry, the supreme court of Indiana held, that the lien of the insurance company was lost by an alienation of the property insured; and the court, commenting on the private character of the books and papers of the corporation, said: "We cannot believe it was the design of the legislature to subject purchasers to the operation of a lien, the existence of which they had no sure means of ascertaining."

The principles of that decision were afterward affirmed by the same court in the case of *The Indiana Mutual Fire Insurance Co. v. Cognillard and others*, 2 Carter, 645; and, so far at least as they affect the essential question in this case, they seem to be in harmony with the general principles of equity governing and limiting the enforcement of statutory liens.

We are of the opinion therefore that the demurrer of Mathers was properly sustained.

Wherefore the judgment is affirmed.

BOONE, assignee, etc., appellants, v. HALL, ETC.

(7 Bush. 66.)

Bankruptcy—jurisdiction of State courts.

In an action brought in a State court, by an assignee in bankruptcy, to obtain control of certain property of the bankrupt alleged to have been fraudulently conveyed by him, *held*, that the State courts had concurrent jurisdiction with the federal courts to make a decree of title and possession of the property sued for.

ACTION by an assignee in bankruptcy to set aside an alleged fraudulent conveyance. The facts appear in the opinion of the court.

Boone v. Hall.

W. R. Bradley and John Rodman, for appellants.

Craddock & Trabue, for appellees.

ROBERTSON, J. The appellant, Boone, as assignee in bankruptcy of W. K. Hall, and the co-appellants, as judgment creditors of said Hall, brought this suit in equity for recovering the control of certain real and personal estate, charged to have been fraudulently transferred by Hall to his co-defendants to defeat the claim of his creditors.

The petition does not explicitly allege that Hall had been declared a bankrupt; but the averment that Boone was by the appointment of the federal court made the assignee of his estate, fortified as it is by the context, implies that Hall had been adjudged a bankrupt, and that his estate, liable to his creditors under the bankrupt law, had been regularly assigned by the court to Boone for the benefit of all the creditors; and according to that law the assignment passed to the assignee all the bankrupt's property which his creditors might subject had there been no bankruptcy. Consequently the petition makes *prima facie* an available case, and we do not doubt that the State court had concurrent jurisdiction to decree in favor of the assignee, for the benefit of the creditors, the title and possession of the property sued for. Such jurisdiction has been too often exercised in Kentucky to allow a denial of it in this court.

It is equally apparent to us that the creditors, as beneficiaries, were proper though not necessary parties. Nevertheless, on motion without answer, the circuit court struck out the name of the assignee for a supposed misjoinder, and then dismissed the petition by the creditors because the title was in the assignee, who alone could maintain the suit for their use. That entire judgment we adjudge erroneous.

Wherefore the judgment in both aspects is reversed, and the cause remanded for further proceedings.

New York Life Insurance Co. v. Clopton.

NEW YORK LIFE INSURANCE CO., appellants, v. CLOPTON, ETC

(7 Bush. 179.)

Effect of the civil war on insurance policy — effect of non-payment of premiums.

The New York Life Ins. Co. issued its policy to C., a resident of Virginia, on the life of her husband, in 1858, containing a provision that, if the yearly premiums were not paid on or before the several dates of payment therein mentioned, the policy should cease and the company should not be liable for any part of the sum insured. The husband died in 1864, being after the beginning of the civil war, leaving the premiums for 1862, 1863 and 1864 unpaid, the agent of the company in Virginia having refused payment for these years. *Held*, that the civil war did not dissolve the contract of insurance; that the non-payment of the three last premiums, in view of the state of war between the north and south, did not avoid the policy, and that C. could recover the sum insured, less the aggregate amount of the three unpaid premiums.

ACTION on a policy of life insurance. The facts are stated in the opinion of the court.

Harlan, Newman & Bristow, for appellant.

A. J. James, for appellee.

ROBERTSON, J. By a policy executed March 13, 1858, the appellant insured the life of James C. Clopton, a minister of the gospel, resident near Lynchburg, Va. The provisions of the policy, so far as material now, are the following:

"The New York Life Insurance Company, in consideration of the sum of \$181.50, to them in hand paid by Mary A. Clopton for the benefit of herself and children, and the annual premium of \$181.50, to be paid on the 13th day of March in every year during the continuance of this policy, do assure the life of James C. Clopton, for the sole use of Mary Ann Clopton and children, in the amount of five thousand dollars, *for the term of his natural life*, commencing on the 13th of March, 1858, at noon; provided always that it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon these express conditions: in case the said Mary A. Clopton shall not pay the said premiums on or before the several days hereinafter mentioned for

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the payment thereof, then and in every such case the company shall not be liable to the payment of the sum insured, or any part thereof; and this policy shall cease and determine."

James C. Clopton died in May, 1864, after paying all the premiums payable before the 13th of March, 1862, but not actually paying the premiums for 1862, '63, '64.

Mrs. Clopton and her children brought this action for the amount of the insurance, after deducting the three unpaid premiums, which the appellant's agent, A. B. Garland, still residing in Virginia, and who received all the other premiums, refused to accept.

The answer resisted the action on two grounds: 1. That the civil war *dissolved* the contract; 2. That the non-payment of the three last premiums avoided the policy. On the double issue thus joined the circuit court, to whom the law and the facts were submitted, after deducting from the \$5,000 the aggregate of the unpaid premiums, adjudged to the appellees the balance with legal interest from the date of the demand and refusal to pay.

A reversal is sought on each of those grounds urged with signal ingenuity and great ability; but cogent as the argument is felt to be on assumed analogies, plausible generalities, and indiscriminating *dicta*, a close analysis of principle, policy, and judicial authority inclines us to concur with the circuit court in its judgment, though not for precisely the same reasons.

The two controlling questions will, as briefly as perspicuity will allow, be now considered in the order in which they have been presented.

Although there is neither proof nor any presumption that either James C. Clopton or the appellees or Garland by any voluntary act helped to incite or prosecute the rebellion against the general government, or in any way participated as an *actual* belligerent in the strife between the hostile sections, yet their residence in the southern section made them and the appellant technical enemies; and the established law of such internecine war interdicted all commercial intercourse between such antagonist parties, and consequently any commercial contract or payment made between them, during the war, would have been unlawful and void. The same principle and policy of the law did not avoid a pre-existing and valid contract which a single act, such as payment of a debt, might have performed. In such cases a suspension of remedy during the war was the consistent and only legitimate effect of the war on such contracts. But both

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principle and policy would have dissolved a contract made before the war for "*continuing performance*," such as partnership or affreightment. Dissolution is the natural and necessary effect of a change so radical in the *status*, rights, and duties of such parties.

The appellant's counsel urge the application of this last doctrine to this case, insisting that the war revoked Garland's agency, and also that the contract was one of continuing performance, and therefore was dissolved and not merely suspended. We do not see the law in that light.

Where a single act, such as payment of a debt, would perform a contract made before the war, belligerent policy interdicted the act because it might aid the enemy in the prosecution of hostilities; consequently suspension of performance until the restoration of peace would effectuate the whole aim of the law without dissolving the contract, which may be ultimately enforced in perfect consistency with the principle and end of the temporary interdict. In that class of cases it is the contract and not the performance that is continuing; and a suspension of remedy and not a dissolution of the contract is all that is necessary, befitting, or just.

But in such cases as partnerships and affreightments the performance is continuous and unremitting, until the end of the contract shall have been consummated; and, therefore, as supervening war between the parties disables them from performing any of the incumbent duties and defeats the object of the contract, a dissolution of the contract is the natural and legal effect of the war. And that illustrates "*continuing performance*," and the contradistinctive reason for dissolving the contract instead of suspending the remedy in that class of cases. The duties of partners to each other, while the relation subsists, are amicable and incessant. A war which puts them in a state of hostile antagonism disrupts their business relations, and incapacitates them to perform their duties to each other. Such a change is itself, in fact and in law, a dissolution.

In like manner the performance of a contract of affreightment being amicable and incessant from the commencement to the completion of the transportation, a war which makes it contraband, and thereby frustrate its object, necessarily destroys the legal obligation of the contract, and the law cannot substitute another to be performed after the close of the war. But the reason for dissolution in those two classes of cases seems to be inapplicable to contracts which may be performed by a single act, or by periodical acts *between*

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which there is nothing to perform and consequently no continuity of performance.

Between a single act and *such* periodical acts there is no apparent difference in reason or principle. Therefore the law which only suspends the remedy in the one case cannot consistently dissolve the contract in the other.

According to this definition, the ordinary contract of insurance does not seem to belong to the class of contracts of "continuing performance" Insurance is a contract *sui generis*, governed by a peculiar and rather an arbitrary code of the modern common law, but recently molded, and not yet stamped in all respects with conclusive authority. Its character, however, is so far matured and established as to distinguish it essentially from ordinary commercial contracts, and especially in the effect of war on its pre-existing validity, which the war as a general rule destroys, whether the contract belong to the category of "continuing performance" or not.

In the case of *Leathers v. The Commercial Insurance Co. of Cincinnati*, 2 Bush, this court, without special consideration, inadvertently illustrated by "partnership *and insurance*" contracts of "continuing performance." Affreightment would have been more appropriate than insurance. But that inapposite suggestion was immaterial, and as the case was properly adjudged on another and the only judicial point, the *obiter* inadvertence is entitled to no consideration in this case. And we now consider insurance as a contract not dissoluble as of "continuing performance," but on another ground, to be presently considered, and which would sustain one judgment in the case, *supra*, even if the risk had continued until after the inauguration of the war.

In this case the insurance was an executed entirety for the prescribed "term," and the only performance which could devolve on the underwriter was to pay the stipulated amount of \$5,000 in the event of loss insured against, fulfillment of which was not a continuing act, but a single act of a *continuing contract*. And the consideration, though payable in annual installments, was yet an entirety also; and, as already suggested, full performance was not as defined of that kind technically styled continuing. Consequently the war did not dissolve the contract on any such ground as that on which it would have dissolved a contract of partnership or affreightment. But, as a general rule, war may dissolve an insurance when it would only suspend legal remedy on ordinary

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commercial contracts not of continuing performance; and this is the most distinctive difference between a policy and other contracts. The only philosophical or authoritative reason for this distinction is the impolicy of assured indemnity against the perils to life or to property, incident to a state of war between the parties to the contract of insurance; and consequently the principle which avoids such contracts made during the war is lately extended to the interdiction of the continuance during the war of such as were previously made, and were valid when made.

To illustrate the principle and its application as recognized in England, the following British decisions are here cited: *Furtado v. Rogers*, 3 Bos. & Pul. 191; *Kellner v. Le Mesurier*, 4 East. 396; *Gamba v. Le Mesurier*, 4 id. 407; *Brandon v. Curling*, 4 id. 410.

In *Furtado v. Rogers*, Lord ALVANLY, C. J., in delivering an elaborate opinion, said that "when a British subject insures against capture the law infers that the contract contains an exception of capture *made by the government of his own country*."

In *Kellner v. Le Mesurier*, Lord ELLENBOROUGH said, respecting the effect of a subsequent war on a policy antecedently issued, "that insurance against British capture *eo nomine* would be illegal and void upon its face, as being directly and obviously repugnant to the interests of the State; and that if such an insurance made, in terms, by a British subject, would be void, an insurance indirectly producing the same effect by the application of the general terms of the policy to the particular event of a British capture would be equally illegal." And the case of *Gamba v. Le Mesurier* is confirmatory.

In *Brandon v. Curling*, Lord ELLENBOROUGH extended this principle to all insurances of property by interpolating, *as implied*, the following condition: "Provided that this insurance shall not extend to cover *any* loss happening during the existence of hostilities between the respective countries of the assured and assurer."

It may be a grave question whether the implied condition as to perils of the war should be extended beyond the belligerent right of capture or destruction by the government of the insurer; and to that extent only we may admit that the continuation of the policy during war would be illegal, and its pre-existing obligation became avoided. But the principle of this concession would not avoid a policy insuring property which is exempted by law from the belligerent power; and while it would avoid a policy insuring the life of one who becomes an actual enemy of the government of the

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insurer, which had the right to destroy that life, it would not affect the validity of an insurance of the life of a neutral or passive non-combatant, over whose life there is no belligerent power; for though the domicile which makes him a technical enemy, whose property may be lawfully captured as enemies' property, yet as such nominal hostility does not subject his life, like his estate, to peril, no belligerent right is affected by the continued validity of the insurance; and consequently in such a case neither authority nor principle would avoid the policy any more than if it had insured the life of a child in the cradle, or insured property exempt from capture or confiscation. *Keir v. Andrade*, 6 Taunt. 504.

Whatever we may think therefore of the entire case of *Brandon v. Curling*, we feel satisfied that no allowable construction of the facts or consistent application of the law in the case we are now adjudging will permit us to decide that the war dissolved the contract of life insurance. Nor can we adjudge that non-payment of the premiums after the inauguration of the war avoided the policy.

However lawful the condition of avoidance as prescribed in this case may be admitted to be, it is in effect a forfeiture which ought not to be favored. To subject to forfeiture all the premiums paid, as well as the \$5,000 for the loss of life, would be harshly and unreasonably penal for no better cause than the inevitable non-precise payment of another installment of premium, which the *law prevented the appellant from a right to receive*. None of the parties can be presumed to have contemplated such disabling war, or to have intended by the condition of avoidance more than *voluntary* failure to pay *when there was legal ability to receive* the premiums.

Then, as according to principle and consistent authority, the contract was not dissolved by the war, how can this court, consistently with the spirit of the literal condition and the facts of the case, adjudge the policy avoided by the *inevitable* non-payment of premiums? Such a decision would seem to be as unreasonable as unjust.

Had it been true, as assumed by the appellant's learned counsel, that the war totally revoked the Virginia agency, then there could have been no legal payment unless the domicile of the assured had been removed within the federal lines, which appellant could not have expected nor reasonably required. On this hypothesis there could have been no avoidance, but postponement only. But on this point the law is more favorable to the appellant; for, as adjudged by the supreme court of the United States in *Ward v. Smith*,

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7 Wall. 452, while the war revoked Garland's authority to negotiate policies, it did not revoke his power to receive premiums for policies previously issued. The war did not, therefore, prevent a legal payment to Garland, in Virginia, which, consequently, would have released the liability of the appellees for the amount so paid.

But, according to the same case, Garland, had he received, could not have legally paid over to his constituent, in New York, during the war; and, consequently, no such payment to Garland could have been available to the appellant otherwise than by looking to the agent as custodian, subject to all hazards, until the close of the war. For that reason, and also because, as he testified, the money, if deposited with him for his constituent, would have been liable to spoliation under an act of confiscation by the confederate congress, Garland refused to receive the premium of 1862, which was punctually tendered to him in the local currency of Virginia; but considering it best for *all parties*, he substituted a bond for payment, with interest, at the end of the war. Having, as he also testified, received all the previous premiums in Virginia currency, and paid it over to the appellant without objection, his authority so to receive might be presumed by the assured; and the fact that Virginia was the place of payment might have implied that the currency of that State, at the time of payment, however it may then have been changed and depreciated, would have been received by the appellant. But, however this may be, as the appellant could not have lawfully collected the premium, and may have lost it by insolvency or confiscation, had it been paid to Garland in money, the tender, as made, and the substituted bond as executed, may be regarded as equivalent to actual payment, and may have been as beneficial to the appellant, and, by its security, even more so. The refusal to accept the tender for the year 1862 dispensed with a formal repetition for the years 1863 and 1864; and, moreover, we may infer from Garland's testimony, that bonds were given for those years also.

On these facts we cannot say that the literal non-payment of the three last premiums was either voluntary or prejudicial, or was ascribable even as much to the appellees as to the appellant.

And so understanding the phase of the case and the attitude of the parties, we cannot, consistently with the spirit of the contract, and equal justice to the parties, adjudge the policy void.

The judgment, therefore, of the circuit court seeming right in principle and just in amount, is affirmed.

Haggard v. Conkwright.

HAGGARD, appellant, v. CONKWRIGHT.

(7 Bush, 16.)

Construction of presidential proclamation—prohibition of commercial intercourse between belligerents.

A contract was made, the consideration of which arose from the following transaction: H., of Kentucky, drew and delivered to C., of the same State, an order addressed to E., of Texas, requesting him to pay money in his hands to T., also of Texas. The order was transmitted through the lines, and executed. *Held*, that this transaction was not a violation of the proclamation of the president of the United States, of August 16, 1861, prohibiting all commercial intercourse between the loyal and rebellious States, Kentucky being loyal and Texas disloyal, and that the contract supported by this transaction was valid.

ACTION on a covenant which formed the consideration of an order for money. The facts are set forth in the opinion.

Charles Eginton, Huston & Mulligan and W. C. Goodloe, for appellant.

Breckenridge & Buckner and James Simpson, for appellee.

HARDIN, J. The appellant, James H. Haggard, being one of the distributees of the estate of his father, John Haggard, deceased, late of the State of Texas, and also the assignee of the interest of his brother, John T. Haggard, in said estate, and being a resident of Clark county, Kentucky, on the 23d day of September, 1861, in the State of Kentucky, drew and delivered to the appellee, J. N. Conkwright, also a resident of Kentucky, an order addressed to S. A. Elkin, administrator of said John Haggard, deceased, requesting him to pay the amount in his hands to which the appellant was entitled, as aforesaid, to A. I. Taul, who, as well as Elkin, resided in Texas; the order containing the following statements:

"In consideration, John N. Conkwright has given his obligation for the amount that you may choose to hand over to said A. I. Taul. Not knowing the amount, I have left that blank for you to fill up, which I do authorize you to do; and this shall be a good receipt against the amount."

And, at the same time and as part of the same transaction, the appellee executed and delivered to the appellant his obligation, which is as follows:

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"Inasmuch as James H. Haggard has sent an order to S. A. Elkin, administrator of John Haggard, deceased, now living in the State of Texas, for blank amount, for A. I. Taul's benefit, I do obligate myself to pay said James H. Haggard any amount the said Elkin may pay over to said Taul, when ascertained—the above amount not known. Said Haggard is to have ten per cent interest per annum from the time the money is paid over in Taul's hands till paid him.

"J. N. CONKWRIGHT."

To an action prosecuted by the appellant, on the covenant above set out, to recover the amount of several payments made by Elkin to Taul upon said order of the plaintiff, which upon demand the appellee refused to pay, he pleaded in connection with the facts already stated, in substance, that the contract of which the order in favor of Taul was a part, and which formed the consideration of the contemporaneous agreement of the defendant, was illegal; because it was made in violation of the proclamation of the president of the United States, issued August 16, 1861, forbidding all commercial intercourse between the citizens of Texas and other States then in rebellion against the laws and authority of the United States and the citizens of Kentucky and other States of the Union which adhered to, and were loyal to, the government of the United States; said proclamation having been issued in obedience to an act of congress approved July 13, 1861. And he further alleged that the money collected by Taul of Elkin was received by him in the State of Texas, as agent of the plaintiff, during the time the people of Texas were in rebellion as aforesaid, and while the plaintiff and defendant each resided in Kentucky, which at the time adhered to the United States and was within the military lines of the federal government.

The matters of defense thus presented being adjudged to be sufficient on demurrer, and the plaintiff agreeing that the averments of the answer were true, a verdict and judgment were rendered for the defendant in accordance with the previous ruling and a peremptory instruction of the court; and the plaintiff has appealed from the judgment.

This court has repeatedly recognized the proclamation of the 16th of August, 1861, as public notice of the previous congressional recognition of a state of war between the seceding and adhering States of the Union, which, according to the laws of war as well as the act of congress, suspended all peaceful relations, and interdicted commercial intercourse between the people of one belligerent and

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those of the other; and, as a logical and legal sequence of that state of non-intercourse, all commercial contracts made in or founded on a violation of it were illegal and void.

But, conceding that this is so, the question arises, what principle of law or public policy has been violated by the contract in this case? The agreement sought to be enforced was not between enemies, but citizens of Kentucky, owing allegiance to the same government; and though it operated to transfer the money which was the subject of the contract from the hands of one citizen of the enemy's country to those of another, it subjected nothing to the forfeiture denounced by the act of congress as coming from or proceeding to the opposing hostile section or State. It is insisted, however, for the appellee, that the transaction involved commercial intercourse between the contracting parties in Kentucky and Taul and Elkin in Texas, the order of the appellant being drawn upon one of them in favor of the other. This may be true, constructively and incidentally, and yet not have affected the validity of the transaction, at most, further than to suspend the authority of Taul to act as agent during the proclaimed non-intercourse. But according to the recent case of *Wood v. Smith*, 7 Wall. 447, it was not illegal for Taul to receive the money in Texas provided he did not violate the law by remitting it to the party entitled to receive it in Kentucky. The supreme court in that case, in referring to the rule that interest is not recoverable on debts between alien enemies during war of their respective countries, said: "That rule can only apply when the money is to be paid to the belligerent directly. When an agent appointed to receive the money resides within the same jurisdiction with the debtor, the latter cannot justify his refusal to pay the demand, and, of course, the interest which it bears. It does not follow that the agent, if he receive the money, will violate the law by remitting it to his alien principal."

An authority more directly applicable to this case, if not conclusive of the question involved, is the opinion of the United States circuit court, delivered by Justice LIVINGSTON, of the supreme court, in 1820, in the case of *The United States v. Barker*, 1 Paine's C. C. 156, the question decided being whether a bill of exchange drawn by a citizen of the United States on a British subject at Liverpool, on the second day of July, 1814, was unlawful, this country and Great Britain being then at war. The col.

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clusion of the court, after reviewing the authorities cited, was as follows :

“The opinion of the court, then, is, that the plaintiff, by drawing the bill in question, violated neither the laws of nations nor any municipal regulation of his own country; that he did an act perfectly innocent, if not meritorious, and which has too long received the sanction of public opinion and general usage to render it necessary or proper to be checked by the interposition of a court of justice, which could not be done without sacrificing the interest of our innocent and unsuspecting merchants, to gratify the cupidity of those who may since have been advised that the transaction was unlawful, and may be desirous of taking advantage of it.”

Although the answer of the defendant in this case, which was agreed to as true by the plaintiff, represents that Taul, in receiving the money, acted as the agent of the plaintiff, the contract between the parties neither stipulates nor seems to contemplate that Taul should pay over the money when collected to the plaintiff, but expressly provides for the payment by the defendant of such an amount as Taul should receive, with ten per cent interest thereon, from the time of Taul's receipt of the money in Texas.

Whatever may have been the relative rights of the appellee and Taul, who, it appears, was his father-in-law, and whether the object of the appellee in procuring the payment of the money to Taul was to satisfy an indebtedness to him, or that Taul should remit it to him or hold it for his use, the contract had the effect to divest the appellant of his right to the funds in the hands of Elkin, which he had a right to dispose of, although he might not withdraw them during the war; and this, in our opinion, was a valid and sufficient consideration for the covenant of the appellee.

It results that the court erred in overruling the demurrer of the plaintiff to the answer of the defendant, and, in instructing the jury, upon the agreement of facts, to find for the defendant.

Wherefore the judgment is reversed, and the cause remanded for a new trial, in conformity to the principle of this opinion.

The Security Fire Ins. Co. of N. Y. v. The Kentucky Marine and Fire Ins. Co.

**THE SECURITY FIRE INSURANCE CO., OF NEW YORK, appellants,
v. THE KENTUCKY MARINE AND FIRE INSURANCE CO.**

(7 Bush. 81.)

Retrospective insurance — parol contracts to insure.

When the property is distant and its *status* unknown to either party an insurance against fire will bind the insurer for a loss occurring before the date of the contract, if such appears, either from the policy or from attending circumstances, to have been the intention of the parties.

An oral contract to issue a policy of insurance is binding and may be specifically enforced or the court may award damages the same as in an action on an executed policy.

A provision in a company's charter requiring that "all policies and contracts of insurance * * * shall be subscribed by the president," relates only to executed insurances, and does not abridge the common-law right to make an oral executory contract for insurance.

THE facts are stated in the opinion.

Bodley & Limball, for appellant.

William Atwood, for appellee.

ROBERTSON, J. In the summer of the year 1865, McFerran, Manifee & Co., owning a large quantity of cotton purchased in Georgia, for resale in New York — to be shipped from Columbus in barges down the Chattahooche to Appalachicola, in Florida, and to be thence transhipped in the *Mary Lucretia* and *Metropolis*, ships, to the city of New York — procured from the appellee an oral contract for insurance against the perils of navigation, which the appellant re-insured to the appellee; and to fill up the uninsured gap between the landing and transshipment of the cotton at Appalachicola, the owners also obtained from the appellee, on the 10th of October, 1865, an oral contract for insurance against fire risks "*on cotton at Appalachicola awaiting shipment per Mary Lucretia and Metropolis.*" On the same day the appellant made with the appellee a similar contract of re-insurance of the same cotton against the same risk. And, on the 17th of October, 1865, the appellant's agent, Muir, made in his book B, kept by him as evidence of insurances, an entry of the insurance and re-insurance, described as

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insuring against a "*fire risk on cotton at Appalachicola awaiting shipment.*"

There is neither proof nor sufficient presumption that, at the date of the entry in book B, owners or insurers knew that the cotton had reached Appalachicola; but, as afterward appeared, some of it (46 bales) had been consumed by fire at the wharf in Appalachicola on the 6th of October, 1865.

On satisfactory proof, the appellee adjusted the loss and paid the owners its portion of the liability according to its contract of insurance, and thereafter brought this suit against the appellant for a specific execution of its contract of re-insurance and for indemnity in damages, and finally recovered a judgment, which by this appeal the appellant seeks to reverse on the following grounds, on which the action was unsuccessfully defended:

1. There was no retrospective insurance or re-insurance against fire beyond the date of the contract.

2. An oral contract for insurance was not, according to the common law, binding and enforceable.

3. If such a contract was valid at common law, the appellee's charter modified that law in that respect by requiring a written memorial signed by the president; and, consequently, as the alleged insurance was not binding, the re-insurance was not obligatory, because it only insured the original insurer against an enforceable liability.

It seems to this court that none of these grounds are sustained by the law and the facts in the case.

1. Simple insurance, *prima facie*, implies the existence of the thing insured at the date of the contract. But when, as in marine policies, the thing being distant and its *status* unknown to either party, an insurance "*lost or not lost*" may bind the insurer for a loss occurring before the date of the contract. Such a provision is quite usual in fire as well as marine insurances, and without these express words circumstances may sufficiently imply the same intent. 1 Arnould on Ins. 25; Phill. on Ins., § 925; *General Int. Ins. Co. v. Ruggles*, 12 Wheat. 403.

The marine insurance and re-insurance in this case were expressly retrospective, and the evident purpose of the owners and of the appellee was to protect the cotton from fire from the landing to the transshipment of it at Appalachicola. The testimony is conclusive to that effect. This authorizes the presumption that the insurance

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was co-extensively comprehensive; and the testimony, when carefully analyzed, preponderates decidedly that way, and does not conflict with the necessary construction of the entry in book B.

2. Although a policy, as an executed contract of insurance, is defined to be documentary and authenticated by the underwriter's signature, yet a contract to issue a policy as an executory agreement to insure may be binding without any written memorial of it. No statute of frauds applies, and the common law does not require writing. This has been often adjudged; but for the purpose of mere authority now the cases of *Taylor v. Merchants Ins. Co.*, 9 How. 390; and of *Commercial Ins. Co. v. Union Mutual Ins. Co.*, 19 id. 318, are deemed sufficient. And in the case in 9 Howard the supreme court decided, as many other courts have also decided, not only that such an oral contract for a policy might be specifically enforced, but that a court of equity having jurisdiction for specific enforcement would, to avoid unnecessary circuitry, adjudge the damages just as if a policy had been executed, and an action had been brought on it for the loss of the thing thereby insured.

3. In our judgment the appellee's charter does not require such executory contract to be in writing. *If it does it is an anomaly, for we know of no other American charter that does so require.*

The seventh section of the appellee's charter recognizes the power of the corporation to insure all kinds of property against fire and marine risks, and *to do all things respecting insurance which an individual might lawfully do*, "and all other things necessary and proper to promote these objects." As the common law allows an unincorporated citizen to make contracts of insurance, and does not require written memorials of executory agreements to insure, and the object of an act of incorporation is only to give legal individuality to a multitude of persons; and to limit the natural rights and powers, this seventh section certainly concedes the right of this corporation to make initial contracts for insurance without any writing; and we cannot presume that the thirteenth section was intended to curtail that right by providing "that all policies or contracts of insurance which may be made or entered into by the said corporation shall be subscribed by the president or president *pro tem.*, and signed and attested by the secretary, and being so signed and attested shall be binding and obligatory on the said corporation *without the seal thereof*, according to the tenor, extent, and meaning of such policies or contracts."

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Even according to its literal interpretation this section does not require all contracts of insurance to be in writing, but only dispenses with the corporate seal for authenticating such as are in writing whenever signed and attested as prescribed, and *which cannot be done as to oral contracts*. It applies to the authentication of written contracts, and does not purport to change the common law as to what contracts shall be written. If such a repeal of the common law had been intended, why did not the section expressly require that all contracts, executory as well as executed, for instance, shall be in writing?

"All policies or contracts of insurance" imports executed insurances, and not executory contracts for policies or *for* insurance. Such initial contracts for insurance by policy are generally made by agents and neither could be conveniently nor, so far as we know, ever have been, signed by the president and secretary. The policy only, *in whatever form*, is so signed.

The fair inference is, that the object of the thirteenth section was to enlarge the common-law rights of the corporation and not to curtail them, and consequently the whole aim of that section was to dispense with the corporate seal in cases in which it was previously necessary for authenticating corporate acts in writing; and such has been the judicial construction of the like provisions in charters in other States.

A general statute of Massachusetts, applicable to all insurance companies, provides that all policies of insurance made by such companies *shall* be subscribed, etc., and be as obligatory as if certified by the common seal. The supreme court of that State construed that enactment as intended only to dispense with the corporate seal, and not as requiring writing not required by the common law, and that an oral contract to issue a policy was valid and enforceable. And this was affirmed by the supreme court of the United States in the case in 19 Howard, *supra*. The slight difference in the language of the 13th section and in that of the Massachusetts act is not, in our opinion, such as to require a different interpretation of the object of the two provisions. In most of the States, as well as in the supreme court of the United States, executory oral contracts to insure have been specifically enforced in equity, although executed contracts must be in writing. See Sandf. 408; 4 Cow. 646; 17 Iowa, 276; 20 Ohio, 529.

And in a case published in 1 Am. Law Reg. (N. S.) p. 116,

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Justice GRIER adjudged, in the western district of Pennsylvania, that equity would enforce an oral agreement *for* insurance even though the insurer's charter required that "all policies, bargains, contracts, and the agreements for insurance *shall be in writing or in print*, and signed by the president and attested by the secretary." This is a peculiar case, which may be somewhat questionable, as the charter expressly required writing in policies and all other contracts *for* insurance. But his notion was that there was no purpose to repeal the common law, but that the legislative object was to require writing in policies and all other executed contracts *ejusdem generis*. However this may be, we are satisfied that the 13th section of the appellee's charter *not expressly requiring writing* does not modify the common law as to oral contracts *for* insurance. And we are also satisfied that Muir, as appellant's agent, had implied authority to re-insure against fire out of Kentucky as well as in it.

The consequence is, that the appellee was entitled to judgment; and the appellant, re-insuring the fire risk taken by the appellee for the owner, must be liable as for a fire and not a marine risk.

The judgment, conforming to the fire standard by which the appellee's liability was adjusted, does not therefore appear too high; the amount does exceed the legal liability according to the law and the facts of the case.

Wherefore the chancellor's decree is affirmed.

NOTE.—That a parol agreement to insure is valid and binding has been held in the following additional cases: *Trustees Baptist Church v. Brooklyn Fire Insurance Company*, 19 N. Y. 305; *Audubon v. The Excelsior Insurance Company*, 27 id. 216; *Hamilton v. Locomotive Insurance Company*, 5 Barr. 389; *City of Davenport v. Peoria Insurance Company*, 17 Iowa, 276; *Brayton v. Appleton Mutual Insurance Company*, 47 Me. 259; *Andrews v. Essex Insurance Company*, 3 Mason, 6; *McCulloch v. Eagle Insurance Company*, 1 Pick. 378; *Palm v. Medina Insurance Company*, 20 Ohio, 529; *Fish v. Cottinet*, N. Y. Ct. of Ap. 1871, not reported.

Payment of the premium is not essential as a consideration precedent to a valid verbal agreement to insure. *Audubon v. Excelsior Insurance Company*, 27 N. Y. 216; *Trustees v. Brooklyn Fire Insurance Company*, 19 id. 305; *Flint v. Ohio Insurance Company*, 8 Ohio, 501; *Kelly v. The Commerce Insurance Company*, 10 Bosw. 82; *Baxter v. Massachusetts Insurance Company*, 13 Allen, 320.

In case of an oral agreement, preliminary to a written policy, the obligation of the agreement continues until a valid and binding policy is either tendered or delivered. *Kelly v. The Commerce Insurance Company*, *supra*; *Commerce Insurance Company v. Halleck*, 3 Dutch. (N. J.) 645. — REP.

Thompson v. Wharton.

THOMPSON *et al.*, appellants, v. WHARTON.

(7 Bush. 563.)

Agreement to secure pardon — Powers of military tribunals.

T. and others gave their promissory note to W. on consideration that W. would use his personal influence with a commanding general to secure the pardon or commutation of the sentence of T., who had been arrested by the military authorities of the United States, in 1865, on the charge of being a guerilla, tried at Louisville, convicted and sentenced to death. In an action on the note, *held*, that the consideration was valid on the ground that the military courts had no jurisdiction of the person convicted.

ACTION on a promissory note. The facts are stated in the opinion.

J. P. Thompson and T. N. & D. W. Lindsey, for appellant.

LINDSAY, J. In April, 1865, Solon Thompson was arrested by the military authorities of the United States, and in the following June was tried by a military court, held at Louisville, upon the charge of being a guerilla, and was convicted and sentenced to suffer death on the 12th day of July, 1865. Prior to his trial, Wharton, who was a practicing attorney in said city, was employed to defend him for the agreed fee of \$100, which was paid in cash, and the further sum of \$170, to be paid upon condition that Solon should be acquitted; and for this last amount the prisoner and his father, J. K. Thompson, executed their joint note.

On the day fixed for Solon's execution a new contract was made with Wharton, he agreeing, by proper proceedings before the commanding general, without whose approval the sentence of the court could not be carried into execution, to prevent the infliction of the adjudged punishment, and, if possible, to procure the discharge of the condemned man, in consideration of the sum of \$300, to be paid only in event of his success. The payment of this amount was secured by the joint note of J. K. and W. K. Thompson and J. M. Bowman, due six months thereafter. Said note was deposited with a third party, and was delivered to Wharton by the direction of J. K. Thompson after the discharge of Solon from custody, which took place in March, 1866, the execution of the sentence of death having been delayed, and he in the mean time

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having been confined in the penitentiary. This action was instituted to recover the amount of the last note.

Appellants set out all these facts in their answer, and also claim that appellee took advantage of the unfortunate circumstances by which Solon was surrounded, and by fraud and oppression extorted from his father and the other obligors the execution of the note, by asserting his intention to abandon all further efforts in behalf of the condemned man unless the same was executed. It appears from the answer that, by the terms of his original employment, Wharton was to defend the prisoner upon his trial by the military court. Hence his duty as attorney ended when the proceedings in that court were finally concluded. He was under no legal obligation by reason of such employment to exert himself to prevent the approval of the sentence by the commanding general, nor to procure the pardon of his late client, and his refusal to do so, until a reasonable compensation for such services as he might be required to render was secured to him, cannot be regarded as an act either of oppression or fraud. Upon the trial of this cause the circuit judge instructed the jury that the onus was upon the appellants to establish the fraud or oppression alleged by them, and that any service rendered by Wharton under his last agreement constituted a sufficient consideration to uphold the note.

Appellants asked for five instructions, all of which were refused. They also asked leave, after the evidence was closed, to amend their answer, and the court refused to permit them to do so. As the instructions refused and the rejected amended answer relate to the same subject-matter, and were intended to raise the same issue, they will be considered together. The court was asked to instruct the jury that, if they believed from the evidence that the sole consideration for the execution of the note sued on was the agreement of Wharton to use his personal influence with the commanding general to secure the pardon of Thompson, or to have his punishment commuted, that such agreement was contrary to public policy and void. If such be the law, then the court erred in rejecting the amendment to the original answer, and a portion of the instructions at least should have been given.

Comyn, in his work on Contracts, page 261, states the rule to be that "no action will lie to recover a sum of money for endeavoring to obtain a pardon;" and he quotes with approval the language of Lord ELDON, who, in the case of *Jones v. Birney*, says, "that where

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a person interposes his interests and good offices to procure a pardon, it ought to be done gratuitously and not for money. The doing of an act of that description should proceed from pure motives and not from pecuniary ones."

This court, in the case of *McGill's Administrator v. Burnett*, declared a contract to procure the remission of a forfeiture void, because such agreements "tend to obstruct a correct administration of government," and are calculated to induce persons to use their influence in such manner as to defeat public justice. 7 J. J. Marsh. 640.

These reasons apply, and should most certainly control, in all cases in which the party whose pardon or release is sought to be obtained has been convicted of crime by a legally constituted tribunal, having the constitutional right to try and punish the offender. Was Solon Thompson tried and convicted by such a tribunal?

From the record before us we are warranted in concluding that at the time he is charged to have committed the offense for which he was tried, as well as at the time of his arrest and of his trial, he was neither a member of the land nor naval forces of the United States, nor was he charged with being a spy, nor a public or domestic enemy, guilty of any violation of the laws of war. Upon the contrary, it seems that he was a citizen of Kentucky, and if guilty of any offense at all against the federal government, of such only as would authorize the regularly constituted courts of the United States to inquire into and pass upon his guilt after he had been regularly indicted by a grand jury. And these courts were at that time open in the city of Louisville for the trial of all such offenders. Hence, according to the opinion of the supreme court of the United States in the case of *Ex parte Milligan*, 4 Wall. 2, the trial of Thompson by the military court was unauthorized by law and forbidden by the constitution, and consequently its sentence was a nullity, and the infliction of punishment upon the prisoner under such sentence would have been not only unwarranted, but in direct violation of the laws of Kentucky.

Under these circumstances the appellee undertook, by the use of his personal influence with the military commander, to save the unfortunate man from the impending danger of threatened execution or unauthorized and illegal imprisonment. Such an act cannot be regarded as an agreement to obstruct the proper administration of the government nor to defeat the ends of public justice

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The object sought to be accomplished, as well as the means to be resorted to, were entirely defensible, whether regarded from a legal or moral stand-point; and, such being the case, it is difficult to perceive how the contract, constituting the consideration of the note, can be regarded as contravening public policy.

We are of opinion that the circuit court did not err to the prejudice of the appellants either in rejecting their amended answer or in refusing to give the instructions asked for. The third instruction, given at the instance of the appellee, is less favorable to him than it should have been. It requires the jury to believe that there was proof tending to show that he *had* rendered at least some service in obtaining, or attempting to obtain, the commutation of Solon Thompson's punishment or his release from custody, although no such issue is raised, or attempted to be raised, in the pleadings.

Judgment affirmed.

BRADLEY, appellant, v. McATEE *et al.*

(7 Bush, 657.)

Constitutional law — Repair of streets.

The charter of a city conferred upon the city council power to cause the improvement of streets at the cost of the owners of lots fronting such improvements, and provided that when any street had been once so improved it should be thereafter kept in repair at the expense of the city. Afterward a new charter was granted to the city, which gave the council power to improve all streets by original construction or reconstruction at the exclusive cost of adjacent owners. Acting under this last charter the council caused a street, which had been improved under the first charter at the cost of the adjacent lot owners, to be re-paved, and assessed the cost on adjacent owners. *Held*, that the provision in the first charter, "that after the first improvement, repairs were to be made at the expense of the city," was not a contract, and that therefore the second charter and the proceedings under it were constitutional and valid.

THE facts are stated in the opinion.

John T. Bunch, for appellant.

Barret & Roberts, Muir & Bijur, and *Woolley*, for appellee.

LINDSAY, J. Section 2, article 7, of the charter of the city of Louisville, adopted in the year 1851, conferred upon the general council the power to pass ordinances to procure the improvement, either by grading and paving, or by grading, paving, and macadamizing, or by grading and planking, any portion or the whole of any street or alley then established, or which might thereafter be established, within the city limits, at the cost of the owner or owners of the ground fronting such improvements, to be apportioned according to the number of feet front each might own; and a lien was created on said ground to secure the payment of said costs.

Section 6 of said article further provided that when any street or alley had been once graded and paved, or graded and otherwise improved, as provided in section 2, at the cost of the owners of the ground fronting thereon, and was accepted by the general council, the part of such street so improved should thereafter be kept in repair and cleaned at the expense of the city.

Under this delegated power the general council, as is made to appear by the agreed facts in the record, procured that portion of Broadway, between Jackson and Hancock streets, to be graded, paved, and macadamized at the cost of the lot-owners whose grounds fronted thereon, and the same, when completed, was accepted by said council.

Afterward, on the 3d of March, 1870, the general assembly granted to the city of Louisville a new charter, the 12th section of which embodies this language: "Public ways, as used in this charter, shall mean all public streets, alleys, sidewalks, roads, lanes, avenues, highways, and thoroughfares, and be under the exclusive management and control of said city, with power to improve them by original construction and reconstruction thereof as may be prescribed by ordinance. Improvements, as applied to public ways, shall mean all work and material used upon them in construction and reconstruction thereof, and shall be made and done as may be prescribed by ordinance, at the exclusive cost of the owners of lots in each fourth of a square, to be equally apportioned by the general council according to the number of square feet owned by them respectively, except that corner lots (say thirty feet front and extending back as may be prescribed by ordinance) shall pay twenty-five per cent more than others for said improvements." Said section further provides that a lien shall exist on the lots for the cost of said improvements.

Acting under the authority delegated by this last charter, the

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city, by an ordinance regularly adopted, procured that portion of Broadway, between Jackson and Hancock streets, to be reconstructed, by tearing up and removing the material used in its original construction, and substituting therefor what is known as the "Nicolson pavement." To pay for this improvement an assessment has been made against the lots fronting the same, as authorized by section 12 of the charter of 1870.

Against a lot owned by the appellant, Bradley, there has been assessed the sum of \$553.68, which amount he admits to be correct and proper under the provisions of the ordinance. He also admits that the said improvement has had the effect of enhancing the value of his lot to an amount equal to said assessment; and waiving all technical objections to the proceedings of the city and its officers touching the matter, he resists the payment of the assessment upon the sole ground that, as the owner of his said lot was compelled to pay an assessment made against the same, to defray the costs of grading and macadamizing the street under the provisions of the charter of 1851, and as said charter, by reason thereof, required the city thereafter to keep it clean and in repair, that this amounted to a covenant, upon the part of the city or the State, to forever exempt said lot from further taxation for the purpose of reconstructing, repairing, or cleaning the same; that said covenant runs with the land, and had passed to him; and that the charter of 1870, in so far as it attempts to release the city from its undertaking or agreement to keep said street in repair, is in conflict with both the federal and State constitutions, because, if valid and effectual, it would have the effect of impairing the obligations of contracts.

It is by no means clear that the imposition upon the city by the charter of 1851, of the duty of keeping in repair such streets as had been once improved at the cost of the property owners, would apply in cases in which it might become necessary to reconstruct the same with new and different material; but we do not regard it as essential in this case to determine that question.

Unless, in estimation of law, there was a contract, in the constitutional sense, between the public and the owner of appellant's lot, it is clear that his defense is not well taken; and it is to this question that the attention of the court will be directed.

The right of the State government to assess the cost of the improvement of streets, on the property fronting on the same, grows out of the sovereign power of taxation; and when such assess

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ments are imposed to pay for local improvements, clearly conferring special benefits on the property taxed to the extent of the assessments, the constitutionality of the same cannot now be questioned without disregarding the adjudications of almost all the American courts. In this State this question has been frequently considered, and may be now regarded as conclusively settled by the repeated adjudications of this court. *The City of Lexington v. McQuillan's Heirs*, 9 Dana, 514; *Hyatt v. City of Louisville*, 2 B. Mon. 177; and subsequent cases. These cases also settle the principle that the general assembly can constitutionally delegate this sovereign power of taxation to local municipal governments, either with or without restrictions or limitations.

By the charter of 1851 this power was only partially delegated to the local government of the city of Louisville. Under the same, property owners could be compelled to pay the expense incurred in the original improvement made upon the streets upon which their property fronted. This having been accomplished, the delegated power was exhausted, and the city was required henceforth to keep such streets in repair at the general expense, not because it had covenanted with the owners of the lots to do so, nor because the power of taxation in the State government was not adequate to impose additional assessments upon said property owners for the repair or reconstruction of the streets, but because the power delegated to the municipal government had, by the terms of the grant itself, ceased to exist.

Ordinarily governments, in the imposition of taxation, however many the conditions and limitations voluntarily imposed upon their exercise of this sovereign right, cannot be said, in any sense, to be contracting with the tax payers. "The taxing power of a State is never presumed to be relinquished, unless the intention to relinquish is *declared* in clear and unequivocal terms." *Philadelphia and Wilmington R. R. Co. v. Maryland*, 10 How. 394. And even then the State will not be irrevocably bound, unless some duty is imposed upon the tax payer as the consideration of the grant, which the citizens of the State are not generally required to perform; or, unless by the exemption, he is induced to embark in some enterprise, or to invest his means in some adventure which, if successful, will result advantageously to the State as well as to himself. And this we conceive to be the doctrine upon which the exemptions in the way of taxation in favor of banks, railroads, and other *quasi*

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public corporations have been upheld by the courts as coming within the legal acceptation of the term "contract." In the case of *The State of New Jersey v. Wilson*, 7 Cranch, 165, the State agreed with the Delaware Indians that, in consideration of the surrender by them of certain claims to the southern part of the State (then a colony), that other lands should be purchased for them to reside upon, which should thereafter be "*exempted from taxation*." This exemption, in view of the consideration passing from the Indians to the public, was held to be a contract, which the State could not impair by subsequent legislation.

Sedgwick, in his work on statutory and constitutional law, extracts from the case of *Butler et al. v. Penn*, 10 How. 418, the doctrine that the contracts designed to be protected by the federal constitution are "contracts by which perfect rights—certain, definite, fixed, private rights of property—are vested, as distinguished from rights growing out of measures or engagements adopted or undertaken by the body politic or State government for the benefit of all; and which, from the necessity of the case, and according to universal understanding, are to be varied or discontinued as the public good may require."

Prior to the adoption of the charter of 1851, the city government of Louisville had the authority, under existing laws, to procure the improvement of streets, and to keep them in repair at the expense of persons owning ground fronting on the streets so improved and repaired. Under said charter the lot-owners on Broadway, between Jackson and Hancock streets, were required to perform no duty nor to pay any tax which the State government could not have unconditionally exacted. Hence, in paying the assessments made against them for the original improvement of said street, they sacrificed no legal right, nor made any extraordinary or unusual contribution out of their private wealth to the public. They did nothing which, by any possible construction, can be deemed a consideration sufficient to bind the State to exempt their said property from similar taxation throughout all time to come. The exemption in their favor grew out of the limitation upon the delegated power of the city government—a limitation voluntarily imposed thereon by the general assembly, and which that department of the State government had the right to remove at any time public policy might seem to demand its removal.

No contract was made nor intended to be made between the

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citizen and the sovereign. The temporary exemption of the citizen's property from a given character of taxation was a mere act of grace, which bound the State only so long as the statute under which it was claimed remained upon the statute-books unrepealed. A different construction of the charter of 1851 would have the effect of conferring upon those property-holders who, under its provisions, improved the streets upon which their grounds front, privileges which no other class of the citizens of Louisville enjoy.

The property taxed for the improvement of streets before the adoption of the charter of 1851, and that taxed for the same purpose since its repeal by the adoption of the charter of 1870, can undoubtedly still be taxed for the purpose of reconstructing or keeping said streets in repair, and, according to the theory of the appellant, can also be compelled to contribute to the reconstruction and repairing of the street upon which his property fronts. This inequality of taxation, necessarily following the construction insisted upon, is a strong if not a convincing argument against its correctness, or that it is the exemption, and not the law repealing it, which is in violation of the constitutional limitations upon the power of taxation.

For these and other reasons we deem it unnecessary to discuss, we concur with the chancellor in the conclusion reached by him upon the state of facts as agreed by the parties and presented by the record.

Wherefore his judgment is affirmed.

DUKER, appellant, v. FRANZ.

(7 Bush. 272.)

Alteration of promissory note after execution and delivery.

Where a promissory note appeared on its face to have been originally dated February, 1868, and to have been afterward changed to 1869, by making the figure 9, over the figure 8, — *held* that if the alteration was made by the holder, after the execution and delivery of the note, in order to correct a mistake and make the note conform to the intention of the parties, such alteration did not invalidate the note, even if the signer had no knowledge of such subsequent alteration.

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ACTION against a surety on a promissory note. The facts are stated in the opinion

Dembitz & Wehle, for appellant.

O. F. Stirman, for appellee.

LINDSAY, J. Duker, as the surety of Zahner, joined with him in the execution of a note to Shoenlaub for \$800, due seven months after date. The note appears upon its face to have been originally dated February 1, 1868, and to have been changed to 1869 by making the figure 9 over the figure 8. The note having been assigned to Franz, he brought suit thereon in the Jefferson court of common pleas.

Duker answered, and among other defenses pleaded that, after the execution and delivery of the note, its date had been altered, as above indicated, without his knowledge or consent, and that in consequence of said alteration was not his act and deed. The disposition of Zahner, principal in the note, makes it clear that February 1, 1869, was the day upon which the note was executed. He states that the note was written by him; that he had no recollection of changing the date from 1868 to 1869; that he did not make such change, nor did he see it made by any one else; and that the note in its present condition is just as it was when he and Duker signed it, except as to said apparent change.

Upon the trial the court was asked to instruct the jury to the effect that, if the alteration in the date was made after the execution and delivery of the note, without the knowledge or consent of Duker, either by the holder or with his permission, that the same was thereby rendered void, "though the change was made in order to correct a mistake." This instruction was refused; and it is urged with earnestness and ability that in this the court erred to the prejudice of appellant. It seems to be the correct doctrine that an alteration of a note, after its execution and delivery, will render it void in case said alteration is to any degree material; and if the true date of the note sued on was 1868 and it was altered to 1869, it cannot be doubted but that such alteration was material.

But the circumstances in this case indicate that the date of the note, as agreed upon and intended by the parties, was February 1, 1869, and not 1868. And if such be the fact, we cannot admit

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that the alteration made, so as to effectuate the intention and agreement of those interested, is of itself enough to relieve the obligors from the performance of their undertaking.

It is true that upon this question there is some conflict of authority, but we think the reason and philosophy of the law demands that a case of this character should be made an exception to the general rule, that every material alteration in a note made after its delivery and without the consent of the payor renders it void, if indeed it comes within that general rule. We agree that the holder of the note has no right to make an alteration to correct a mistake, unless to make the instrument conform to what *all parties to it agreed or intended it should have been*; but this much he can do without destroying the legal efficacy of the writing. *Hervey v. Hervey*, 15 Me. 357; Parsons on Bills and Notes, 569, 570, 571. The instruction asked for was not qualified so as to bring it within this principle, and was properly refused.

The defense of drunkenness was not made out by the evidence; and though the signature of Duker is not as legible as it would have been perhaps had he been entirely sober, yet there is evidence that he was conscious of his condition and knew what he was doing at the time the note was made. These issues were both properly submitted to the jury by the instructions of the court; and as it was proven that he did write at least a portion of his signature, and as the note itself was before the jury for their inspection, their verdict ought not to have been disturbed.

Wherefore the judgment of the court below is

Affirmed.

PAYNE, appellant, v. ABLE *et al.*

(7 Bush. 344.)

Bankruptcy—Omission of name from schedule—Release of sureties in attachment bond by discharge of principal.

The mere omission of the name of a creditor and his debt from the schedule of creditors and indebtedness, does not, in the absence of design or fraud, affect the validity of a discharge in bankruptcy, as to such creditor.

The sureties in an attachment bond are released by the discharge in bankruptcy of the principal before judgment is rendered against him.

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THE facts are stated in the opinion.

D. W. Sanders, for appellant.

Warner Underwood, for appellee.

LINDSAY, J. In the month of July, 1868, William H. Payne & Brother instituted three suits in equity, in the Warren circuit court, against J. Lee Able and others, seeking to recover large sums of money, and causing orders of attachment to be sued out in each action against the property of said Able. Two of the same were discharged by the execution of bonds in conformity with section 242 of the Civil Code; and in one a bond was given in the sum of \$3,000, stipulating, as provided by section 235, to have the property attached forthcoming and subject to the future orders of the court. Answers were filed by the various defendants. The three causes were consolidated, and various preparatory orders taken up to the 9th of August, 1869, when Able filed an amended answer, pleading and relying upon a discharge in bankruptcy obtained in the district court of the United States for the district of Kentucky on June 18, 1869, releasing him from all debts and claims existing on October 22, 1868, which were provable under the bankrupt act, as a bar to the further prosecution of these suits as against him.

Payne & Brother replied to this plea, and charged that, when Able filed his petition in bankruptcy, he failed to place their names or their debts upon the schedule of creditors and indebtedness annexed thereto; that their claims had not been proven in the bankrupt court; and hence that the discharge presented no bar to their recovery in these actions.

In this state of pleading the consolidated cases were heard, and a judgment rendered dismissing the petitions of Payne & Brother, and overruling a motion to require the sureties on the attachment bonds to pay to the plaintiffs an amount equal to the indebtedness of the bankrupt; and from this judgment an appeal is prosecuted to this court.

We hold that the discharge in bankruptcy was sufficiently pleaded, and that it was admitted to be genuine by the replication; and the only serious difficulty presented is, whether or not the failure of Able to place the names of the Paynes upon his schedule of cred-

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itors and to report their claims among the list of his debts affects the validity of his discharge as to them. We have found no decisions of the federal courts or of the supreme courts of any of the States upon this question under the provisions of the existing act of congress on the subject of bankruptcy. Section 11 of the said act requires the petitioner to annex to his petition a schedule, verified by oath, "containing a full and true statement of all his debts, and, as far as possible, to whom due," etc.; and the rules adopted by the supreme court under the provisions of the act require him to make oath that he has complied with this provision of the law "to the best of his knowledge, information, and belief."

A similar provision was contained in the act of 1841, and a similar rule was adopted for its enforcement. And in the construction of this provision and rule, Chief Justice SHAW, in the case of *Burnside v. Bingham*, 8 Metc. 79, held that "the mere omission of the name of a creditor is not made, by the statute, a substantive ground for preventing or avoiding the discharge of the bankrupt; he is to set forth a true list, 'according to the best of his knowledge and belief.' * * * The plaintiff, then, must go further, and show that his omission was willful and fraudulent, by showing that, contrary to his oath, he did know or believe that the plaintiff was a creditor, and willfully or designedly omitted his name, because he apprehended opposition from the plaintiff, or from some other motive." The same doctrine is held in the case of *Brown & Welman v. Rebb*, 1 Rich. 374. Under the present act the discharge can only be set aside by a direct proceeding upon the ground that it was fraudulently obtained, and we cannot conclude that it can be impeached in a collateral proceeding for any other reason. The replication of Payne & Brother does not charge that Able fraudulently omitted their names from the schedule of his creditors; and, as their claims were provable under the bankrupt act, we are of opinion that his discharge relieved him from all personal liability to them on account of the same.

We are also of the opinion that the court properly refused the rule against the sureties on the attachment bonds. The act of congress, it is true, provides that "no discharge granted under this act shall release, discharge or affect any person liable for the *same debt* for or with the bankrupt, either as partner, joint contractor, indorser, security or otherwise. But the sureties on the attachment bonds were never liable for the *debts*, and did not contract to pay the same

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or any portion of them. In two of the bonds they agreed and undertook that the defendant, Able, should "perform the judgments of the court;" and in the other, that the attached property, or its value, should "be forthcoming, and subject to the order of the court for the satisfaction of such judgment." No judgments were or could have been rendered against Able, and hence the contingencies upon which they were to become liable, as sureties, have not arisen, and cannot now arise. We are of opinion, however, that the petition of Payne & Brother ought not to have been dismissed, as to all the defendants. The discharge of Able did not release Allen of the indebtedness of the firm of Able & Allen to the appellants; and as the Paynes did not prove their claims in the bankrupt courts, the discharge of Able from personal liability to them does not necessarily prevent them from enforcing any liens they may have acquired by the institution of their suits upon the property alleged to have been fraudulently conveyed by Able to his mother-in-law, and by her to his wife. None of these questions seem to have been determined, and as the assignee of Able voluntarily made himself a party to the proceedings in the court below, said court had full power to adjudicate and settle the rights of all the parties growing out of said transactions, and should have done so. To this extent the judgment is reversed, and the cases remanded, with instructions to permit proper amendments to be made to the pleadings, and for further proceedings consistent with this opinion.

C A S E S
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS

ESTY, Adm'r, v. CLARK.

(101 Mass. 26.)

Wife not "relation" of the husband.

A wife is not a "relation" within the meaning of a statute which provides that, "where a devise of real or personal estate is made to a child or other relation of the testator, and the devisee dies before the testator, leaving issue who survive the testator, such issue shall take the estate so devised in the same manner as the devisee would have done had he survived the testator."

BILL in equity by an administrator with will annexed for instructions.

The testator by his will devised, after certain specific legacies, his estate to his wife. The wife died before the testator, leaving a son (the defendant), by a former husband. The testator died leaving a daughter. The defendant claimed the estate devised to his mother, under the general statutes, chapter 92, section 28.

G. M. Brooks, for defendant, to the point that the term "relation" should be construed according to the ordinary interpretation, cited *Clarke v. Cordiss*, 4 Allen, 416; *Opinion of justices*, 7 Mass. 523; *Whitney v. Whitney*, 14 id. 88, 92.

T. C. Hurd, for daughter of testator.

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AMES, J. The 28th section of the general statutes, chapter 92, provides that "when a devise of real or personal estate is made to a child or other relation of the testator, and the devisee dies before the testator, leaving issue who survive the testator, such issue shall take the estate so devised, in the same manner as the devisee would have done if he had survived the testator; unless," etc. It being found as a matter of fact that the wife, the devisee under this will, died before the testator, it would follow that her issue, including her child by a former marriage, would take the estate so devised to her, if she can be said to be a "relation" of the testator, within the meaning of the statute.

What is the true meaning to be given to the word "relation?" It is a very general and comprehensive term, and may include any and every relation that arises in social life. Literally it takes in every kind of connection, and would have so wide a range as to be liable to objection as indefinite and vague. "To avoid this consequence, recourse is had to the statutes of distribution; and it has been long settled that a bequest to relations applies to the person or persons who would, by virtue of those statutes, take the personal estate under an intestacy, either as next of kin or by representation of next of kin." 2 Jar. on Wills (4th Am. ed.) 45. The term is defined by lexicographers as signifying "a person connected by consanguinity or affinity;" and relationship is described as kindred, affinity, or other alliance. The most common use of the term is to express some kind of kindred, either of blood or affinity, "though properly," says Lord HARDWICKE, "by blood." *Davies v. Baily*, 1 Ves. Sen. 84. It certainly cannot be said that there is no relation between husband and wife; but the question is, whether there is such a relationship as is intended by the statute. If relationship includes consanguinity as a necessary element, they are not relations of each other. The supreme court of Pennsylvania has decided that in a will the terms "my nearest relations" or "connections" do not include the testator's wife. *Storer v. Wheatley*, 1 Penn. St. 506. The court in that case say: "A wife is not related to her husband in any respect. Of his connection with her family she is the link, or *commune vinculum*; but so far is she from being connected with him as a relation, that her civil existence is melted into his, and they together form one person. A wife is, therefore, no more a relation of her husband than he is of himself. It was said, *arguendo*, in *Garrick v. Lord Camden*, 14 Ves. 372, that she

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owes her provision under the statute of distributions, not to the supposition that she is one of her husband's kindred, but to the respect that was felt for her title to the customary share which she had previously enjoyed."

Whatever may be thought of the reasoning of the court in that case, there seems to be no authority for holding that the word "relation," in its strict legal and technical sense, includes husband or wife. On the contrary, authorities are found very direct and explicit to the point that they are not "relations." Thus, in 2 Williams on Executors, 1004, it is laid down that "no person can regularly answer the description of 'relations' but those who are akin to the testator by blood. A wife, therefore, cannot regularly claim under a bequest to her husband's relations, nor a husband as a relation to his wife." So, in 2 Jar. on Wills, 49, it is said that "a gift to the next of kin or relations does not include a husband or wife." Both these writers refer for authority to numerous cases cited from the reports.

The conclusion from the authorities seems to be that Edgar W. Clark is not entitled to any part of the estate, and the decree will be entered accordingly, with costs for each party, payable from the estate.

MONUMENT NATIONAL BANK v. GLOBE WORKS.

(101 Mass. 57.)

Corporation — accommodation note of.

The note of a manufacturing corporation in the hands of a holder in good faith, for value, who took it before maturity, and without knowledge that the maker had not received full consideration, can be enforced against the corporation, although it was made as an accommodation note.

R. H. Danc, Jr., & T. K. Lathrop, for defendants.

C. A. Welch & W. W. Warren, for plaintiffs.

HOAR, J. The single question presented for our decision in this cause, all others which arise upon the report having been waived,

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is, whether the note of a manufacturing corporation, in the hands of a holder in good faith for value, who took it before maturity, and without any knowledge that the makers had not received the full consideration, cannot be enforced against them, because it was in fact made as an accommodation note.

The argument for the defendants takes the ground that to issue an accommodation note is not within the powers conferred upon the corporation; and that, as any person taking it had notice that it was the note of the corporation, they had notice that it was of no validity unless issued for a purpose within the scope of the corporate powers, and were therefore bound to ascertain not only that it was executed by the officer of the corporation who had the general authority to sign the notes which they might lawfully make, but that the purpose for which it was issued was such as the charter authorized them to entertain and execute.

The court are all of opinion that this position is not tenable, and that the defense cannot be maintained.

It has long been settled in this commonwealth that a manufacturing corporation has the power to make a negotiable promissory note. *Narragansett Bank v. Atlantic Silk Co.*, 3 Metc. 282. And it was held in *Bird v. Daggett*, 97 Mass. 494, as a just corollary to that proposition, that such a note in the hands of a holder in good faith for value is binding upon the maker, although made as an accommodation note. The question was not discussed, nor the reasons for the decision fully stated, in *Bird v. Daggett*; but it was assumed that the doctrine announced was clear and undoubted law.

The doctrine of *ultra vires* has been carried much farther in England than the courts in this country have been disposed to extend it; but, with just limitations, the principle cannot be questioned, that the limitations to the authority, powers and liability of a corporation are to be found in the act creating it. And it no doubt follows, as claimed by the learned counsel for the defendants, that, when powers are conferred and defined by statute, every one dealing with the corporation is presumed to know the extent of those powers.

But when the transaction is not the exercise of a power not conferred on a corporation, but the abuse of a general power in a particular instance, the abuse not being known to the other contracting party, the doctrine of *ultra vires* does not apply. As was

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said by SELDEN, J., in *Bissell v. Michigan Southern & Northern Indiana Railroad Co.*, 22 N. Y. 289, 290: "There are, no doubt, cases in which a corporation would be estopped from setting up this defense, although its contract might have been really unauthorized. It would not be available in a suit brought by a *bona fide* indorsee of a negotiable promissory note, provided the corporation was authorized to give notes for any purpose; and the reason is, that the corporation, by giving the note, has virtually represented that it was given for some legitimate purpose, and the indorsee could not be presumed to know the contrary. The note, however, if given by a corporation absolutely prohibited by its charter from giving notes at all, would be voidable not only in the hands of the original payee, but in those of any subsequent holder; because all persons dealing with a corporation are bound to take notice of the extent of its chartered powers. The same principle is applicable to contracts not negotiable. When the want of power is apparent upon comparing the act done with the terms of the charter, the party dealing with the corporation is presumed to have knowledge of the defect, and the defense of *ultra vires* is available against him. But such a defense would not be permitted to prevail against a party who cannot be presumed to have had any knowledge of the want of authority to make the contract. Hence, if the question of power depends not merely upon the law under which the corporation acts, but upon the existence of certain extrinsic facts, resting peculiarly within the knowledge of the corporate officers, then the corporation would be estopped from denying that which, by assuming to make the contract, it had virtually affirmed."

This doctrine seems to us sound and reasonable, and, in conformity with it, it was held in *Farmers' & Mechanics' Bank v. Empire Stone Dressing Co.*, 5 Bosw. 275, that an accommodation acceptance by an officer of a mining corporation, on behalf of the company, was not binding unless the consideration had been advanced upon the faith of the acceptance; but that, if the consideration was paid in good faith, after the acceptance and upon the credit of it, it could be enforced.

So it was said by Lord ST. LEONARDS, that he felt a disposition "to restrain the doctrine of *ultra vires* to clear cases of excess of power, with the knowledge of the other party, express or implied from the nature of the corporation, and of the contract entered into." *Eastern Counties Railway Co. v. Hawkes*, 5 H. L. Cas. 331, 373

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The cases on which the defendants rely are cases against municipal corporations, in respect to which the rule is much more rigid, or, for the most part, those in which the other contracting party had notice, upon the face of the transaction, of the want of corporate power.

There can be no doubt that it is very often true that a corporation may be responsible for the unauthorized, and even for the unlawful, act of its agents, apparently clothed with its authority. No corporation is empowered by its charter to commit an assault and battery; yet it has frequently been held accountable, in this commonwealth, for one committed by its servants. Bills of a bank issued without consideration, and even stolen, are good in the hands of an innocent holder for value. Many other illustrations might be given, but enough has been said to show the principle on which our decision rests.

Judgment for the plaintiffs.

STEVENS V. MECHANICS' SAVINGS BANK.

(101 Mass. 109.)

Bankruptcy : payment to bankrupt after publication of notice.

Payment to a bankrupt, made after publication of notice of warrant in bankruptcy, as required by section 11 of the bankrupt act, although made in good faith and without knowledge of the bankruptcy, is no protection against the bankrupt's assignee.

THIS action was brought by the assignee in bankruptcy of one Hall, to recover \$500 deposited by Hall with defendants.

Hall was adjudged a bankrupt on his own petition, the warrant in bankruptcy having been issued October 9, 1867, and notice of the warrant published as required by act of congress of 1867, chapter 176, section 11, on the 12th, 14th and 15th of the same month, in the newspapers. The plaintiff was appointed assignee on the 11th of November following, and assignment of the property duly made.

The \$500 was deposited by Hall October 3, 1867, and was paid over to him by defendants, on his demand, on the 18th of October

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next. The court found that the deposit was so paid over by defendants in good faith on their part, and without any knowledge or suspicion of the proceedings in bankruptcy. Judgment was rendered for defendants and the case reported for the full court.

G. Stevens, in person.

D. S. Richardson, for defendants.

GRAY, J. That an assignee, under the bankrupt laws of the United States, might sue in his own name in the courts of this commonwealth, to enforce the rights of property vested in him by the assignment in bankruptcy, was expressly adjudged in *Ward v. Jenkins*, 10 Metc. 583; and the objection, made at the trial, that the courts of the United States had exclusive jurisdiction of such an action, was waived at the argument.

The notice that a warrant in bankruptcy had been issued, and that the payment of any debts to the bankrupt was forbidden by law, having been published as required by the act of congress of 1867, chapter 176, section 11, and the warrant issued under it, was binding upon all persons, whether they had or had not actual knowledge thereof; and the subsequent payments by the defendants to the bankrupt did not discharge the debt, and affords them no greater protection than if it had been made to any other person not authorized to receive it, as against the assignee in bankruptcy, whose title under the assignment of a later date related back to the commencement of the proceedings in bankruptcy. U. S. Stat. 1867, ch. 176, §§ 11, 14; *Butler v. Mullen*, 100 Mass. 453.

Judgment for the plaintiff.

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SAMPSON V. SHAW, Executor.

(101 Mass. 145.)

Illegal contract — operations in stock.

The plaintiff brought an action against the defendant, an executor, for money had and received to plaintiff's use by defendant's testator, under an agreement made between plaintiff, the testator, and another, to operate in stock for the purpose of making a "corner," the money to be expended by the testator. *Held*, that the agreement was illegal and fraudulent, and that the plaintiff could not recover for any sums actually expended by the testator in the execution of the purposes of the agreement, although a recovery might be had for sums received but not thus actually expended.

ACTION for money had and received. The defendant was an executor under the will of J. Q. Thaxter, by whom the money was alleged to have been received, to the use of the plaintiff. The case having been referred to an auditor, it was found "that the plaintiff, the firm of Thaxter & Company, and John Richardson entered into an agreement to operate in the stock of the Malden and Melrose Horse Railway Company, for the purpose of getting 'a corner,' Thaxter & Company taking one-half, and the plaintiff and Richardson each one-quarter, interest in the operation; that the plan of operation was as follows: Thaxter & Company were to be the managers, and were to buy up a large quantity of the stock, and control it in such a manner as to make a large demand for it, so that parties selling on time would be compelled to pay large differences. Thaxter & Company were then to receive and make proposals and agreements thereon for the purchase of stock, to be delivered at a future day, the parties agreeing to sell, not then having the stock in possession or owning it, and then the sellers, when the day for delivery should arrive, would be compelled to pay such prices or differences as the parties to this combination might ask; the money to carry on the operation was to be furnished, and the profits or losses shared or borne, by the parties in proportion to their respective interests; that said stock at that time was of little, if any, intrinsic value, and was selling in the market for about \$5.00 per share; that Richardson paid in money from time to time, as called for, under the agreement, for carrying on the operations; that the plaintiff authorized Thaxter & Company to use his funds in their hands as far as necessary for the

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same purpose ;” that Thaxter made purchases and expended a large sum of money ; “that the operation in the Malden and Melrose stock was not successful ; and that the money invested therein was substantially lost, and no settlement or adjustment thereof had ever been made.” The auditor decided the agreement void and that the defendant had no defense under it.

It appeared further that the estate of the defendant’s testator was insolvent, but this fact was decided to be no bar to the action. Verdict was given for plaintiff on the evidence in the auditor’s report ; and defendant appealed.

G. A. Somerby & S. S. Shaw, for appellant :

1. The agreement was not void on account of illegality.
2. If the agreement was illegal the parties were *in pari delictu*, and the plaintiff could not recover. *Cannan v. Bryce*, 3 B. & Ald. 179 ; *McKinnell v. Robinson*, 3 M. & W. 434 ; *Ex parte Bell*, 1 M. & S. 751 ; *Howson v. Hancock*, 8 T. R. 575 ; *Vandyck v. Hewitt*, 1 East, 96 ; *Staples v. Gould*, 5 Sandf. 411 ; *Worcester v. Eaton*, 11 Mass. 368 ; *White v. Bass*, 3 Cush. 448 ; *Collins v. Bluntern*, 2 Wils. 347 ; *Perkins v. Savage*, 15 Wend. 412.

T. H. Sweetser & W. S. Gardner, for plaintiff :

1. The agreement was illegal, its purpose being to defraud the community (*Fuller v. Dame*, 18 Pick. 472 ; *Dewitt v. Brisbane*, 16 N. Y. 508 ; Met. Con. 266, and cases ; Gen. Stat. ch. 105, § 6), and the defendant cannot set up this illegal agreement.

AMES, J. The agreement to operate in the stock of the Malden and Melrose Horse Railway Company was relevant and material to the defense, and the auditor ruled correctly in deciding that the evidence tending to prove it was admissible. It can hardly be denied that such a contract as that described in the auditor’s report would be illegal and fraudulent. No association to carry out such a purpose would be recognized, at law or in equity, as having any of the legal incidents of a copartnership. Neither party, as against the other, can enforce what remains to be done, or correct what has been done, under a contract, or rather a conspiracy, of that description. 3 Greenl. Ev., § 90, and cases cited. The auditor, therefore, ruled very correctly “that said agreement for operating was illegal and void, and that the parties did not become copartners by force of the agreement, or of any acts done in pursuance thereof.” But

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it does not by any means follow that the defendant cannot set up any acts done under the agreement, in answer to the plaintiff's claim. On the contrary, although it is very clear that the law will not aid one party to an illegal contract, to enforce it, so far as it remains executory, against the other, it is equally clear that it will not interfere "to restore the party who has paid money upon it." *Ball v. Gilbert*, 12 Metc. 397. In other words, the law will not help either party. The defendant claims the benefit of the familiar maxim, *in pari delicto, melior est conditio possidentis*. If he can prove that Thaxter, at the plaintiff's request, had actually appropriated and paid part of the balance in his hands upon the joint enterprise, to that extent he makes an answer to the plaintiff's claim. He insists that the funds were left in Thaxter's hands with the understanding and agreement that Thaxter was to apply them, so far as should be found necessary, to the payment of the plaintiff's share of the expenses of the joint enterprise; that in fact they were appropriated by the plaintiff himself to that object, so far as they should be wanted; and that, although the plaintiff had the right to disaffirm the contract, revoke the authority, and reclaim the funds, yet, as he never did so, all moneys actually paid out by Thaxter for him and from his funds, on the joint scheme, stand on the same footing as if paid by the plaintiff with his own hand. We think that this view of the law is entirely correct, and that the defendant has a right to set up in answer to the plaintiff's claim, as far as they will go, any and all payments actually made by Thaxter or by Thaxter & Company under the "cornering" agreement, if made on the plaintiff's account, by his authority, or with his consent. As between Thaxter and the plaintiff, there are no particular equities in favor of the latter that would entitle him to get back the money that has been laid out upon an unsuccessful enterprise by or for him, and thus to throw the whole loss upon his associates. This case seems to fall within the rule so clearly laid down in *Ball v. Gilbert*, 12 Metc. 397; *King v. Green*, 6 Allen, 139; *White v. Franklin Bank*, 22 Pick. 181.

It is difficult to distinguish the case in principle from an action against a stakeholder in a wager. The wager is an illegal contract. The losing party may reclaim his deposit from the stakeholder, provided he gives notice and revokes the authority before the money is actually paid over to the winner. *McKee v. Manice*, 11 Cush. 357.

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We think the defendant has a right to have the question of fact passed upon, and that a new trial must be had to ascertain what exact sum, or whether any sum, belonging to the plaintiff, remained in the hands of Thaxter after deducting any and all sums which the defendant can prove that the testator paid under the "cornering" agreement, on the plaintiff's account, by his direction or with his consent.

The defendant, however, insists that the whole fund in Thaxter's hands was placed at his disposal by the plaintiff, without any limitation, to be used at discretion in execution of the illegal common purpose, and that the action cannot be maintained as to any portion of the fund, on the ground that money lent for an illegal purpose cannot be recovered back by the lender. He claims that the plaintiff agreed to pay his proportion; that he set apart and appropriated a particular fund from which his share of the payments was to be made, and that he substantially authorized Thaxter to use the whole of it, if he thought fit, in carrying the scheme through. But this appears to be, strictly speaking, a question of fact rather than law. If the plaintiff advanced and lent the whole fund, with directions merely that the unexpended balance, if there should be any, should be repaid, he cannot recover, for the reason above stated. But if the direction given was merely that Thaxter from time to time should take from the fund enough to pay the plaintiff's proportion of the expenses incurred and investments made, to such extent as the necessities of the speculation should require, the unexpended balance in Thaxter's hands would not be considered as paid by the plaintiff on an illegal contract, but would be recoverable in this action.

It is argued on the plaintiff's behalf that the claim which he makes is for money had and received, traced distinctly to Thaxter's hands, and held by a contract tainted with no illegality; that the defendant, in order to resist the claim, is obliged to set up an illegal agreement, and rely upon it, and that this necessity is the test as to the equality of the delict. However ingenious this suggestion may be, it can hardly prevent the court from taking the whole transaction together, and considering what it is in substance and effect. The application of the maxim *in pari delicto, etc.*, does not depend upon any technical rule as to which party is the first to urge it upon the court in the pleadings. In practice, it is usually insisted upon by the defendant in answer to a *prime facie* case.

Chamberlain v. Bradley.

The objection founded upon the fact that, during a part of the time covered by the various accounts rendered, Thaxter and Bouve were partners, is disposed of by the provisions of the general statutes, chapter 97, section 28, under which the suit may properly be brought against the estate of Thaxter, as if the contract sought to be enforced had been joint and several. See *Burnside v. Merrick*, 4 Metc. 544; *Curtis v. Mansfield*, 11 Cush. 152. It is possible, also, that, upon the evidence reported, the auditor may have found as a matter of fact that, by arrangement among all concerned, it had been made the separate debt of Thaxter, according to the rule in *Wild v. Dean*, 3 Allen, 579. Neither is the fact that the estate has been represented insolvent any bar to the prosecution of the suit, so far as to ascertain how much, or whether any thing, is due to the plaintiff, although it is a very good reason for not allowing execution to issue. Gen. Sta. chap. 99, § 20.

Verdict set aside.

CHAMBERLAIN V. BRADLEY.

(101 Mass. 188.)

Evidence — copy of deed of a corporation.

A certified copy from the registry, of a deed purporting to have been executed under the authority of a corporation by its president, is admissible in evidence without proof that the president had authority to execute it.

THIS was an action for partition of land. At the trial the petitioner, for the purpose of establishing title, introduced in evidence several deeds, among them an office copy from the registry of deeds of a deed from the Edgeworth Company, ending thus: In witness whereof the said Edgeworth Company have caused these presents to be signed by their president, and their corporate seal to be hereto affixed this 5th day, etc. Signed Edgeworth Company, by their president, B. L. Allen. (Seal.)

This deed was duly acknowledged.

Objection was made to the introduction of this copy until it should be proved that the president had authority to execute the deed, but the objection was overruled.

H. W. Paine, for respondents.

T. Wentworth, for petitioner.

HOAR, J. The respondents rely upon only two of their objections to the rulings at the trial, and the others are to be regarded as waived. The court are of opinion that neither of the two is well founded.

1. The petitioner introduced a certified copy from the registry of deeds of a deed from the Edgeworth Company to Homer and Winkley, being one of the mesne conveyances through which he claimed title. It purported to be executed under the authority of the corporation, by its president, and the respondents objected to its admission without proof of the authority of the president to execute it; but it was admitted. This ruling seems to us correct, and in conformity with the established rules of evidence.

It is conceded that an office copy of a deed is generally admissible in evidence where the party claiming under it is not the grantee. *Ward v. Fuller*, 15 Pick. 185. Between natural persons the production of such a copy is evidence of the execution of the deed by the person whose deed it purports to be; of its delivery; of its due acknowledgment; and, in the absence of other evidence, of the seizin of the grantor. This involves the presumption or inference of fact, first, that the seal was the seal of the grantor; second, that it was affixed by him or by his authority; third, that he signed his name or authorized it to be signed for him in his presence; fourth, that it was the grantor who made the acknowledgment; fifth, that the certificate of the magistrate is genuine; and sixth, that the grantor was seized of the land which the deed purports to convey.

There is nothing to be inferred, in case of the admission of an office copy of the deed of a corporation, which goes farther than this. It is presumed to be the deed of the corporation, which it purports to be. The seal is presumed to be the seal of the corporation, affixed by its authority, as in the case of a private person. The authority to execute the deed is of course essential to its validity; but so is the genuineness of the signature of the grantor in any case; and there seems to us as much reason to infer the one from the existence of the record copy as the other. The copy was admissible, because it purported to be the duly executed deed of the corporation, and was therefore presumed to be so; and the existence of all the facts necessary to make it so is presumed as a consequence.

Inhabitants of Woburn v. Henshaw.

INHABITANTS OF WOBURN V. HENSHAW.

(101 Mass. 198.)

Bridge on highway across private canal—liability for injuries to traveler—privileged communications.

A traveler was injured in crossing an unsound bridge on a highway and recovered damages from the town, the present plaintiffs; and, in an action to recover the amount of the judgment from the defendant, it appeared that the bridge was built by defendant's grantor over an artificial channel dug by him across the highway for the purpose of conducting water to his mills; that defendant was in possession of such channel and mills by deeds requiring him to keep the channel in repair, and that repairs had been made on the bridge by defendant's authority. *Held*, that defendant was liable.

Where a party offers himself as a witness, he cannot refuse to answer questions on cross-examination, as to any conversations with his counsel.

ACTION in tort to recover the amount of a judgment obtained against the town for injuries sustained from a defective bridge. Bingham, a traveler on the highway in Woburn, received injuries in crossing a bridge which was built over a canal. He then sued the town and obtained damages for \$6,500; whereupon the town sued the defendant for the amount of such recovery, on the ground that the duty of keeping the bridge in repair devolved on the defendant as the owner of the canal. On the trial the jury found that the canal was built subsequent to the highway and across the highway for the purpose of supplying mills, at a distance of a third of a mile away, with water; that the bridge was built by the owners of the mills, and that the defendant purchased the mills and the canal, and after the purchase occupied and repaired the canal; that the defendant was negligent in repairing the bridge, and that the unsafe condition thereof was the sole cause of Bingham's injury. The deed of defendant of the mills and property which was exhibited, after setting forth that the grantee should be entitled to the use of the canal, provided further, that he should be "subject to one-third of the expense of any repairs that may be necessary on the canal." This was all that related to this point in the deed; and the jury from all the evidence found that defendant did make repairs on the bridge before the accident to Bingham. On the trial the defendant offered himself as a witness, but on cross-examina-

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tion objected to answering questions relating to confidential communication with his counsel. Objection overruled. Verdict for plaintiffs; and defendant appealed.

A. A. Ranney with W. P. Harding, for defendant.

T. H. Sweetser & W. S. Gardner, for plaintiffs.

AMES, J. The only matter that seems to be in controversy between these parties is the question whether the defendant was the person bound by law to keep the bridge in repair. It is established by the verdict that its decayed and unsafe condition was the sole cause of the accident.

The jury have found, under instructions which appear to have been correct, that the highway was of earlier date than the canal. The owner of the soil traversed by the highway had a right to construct a water-course across it, subject to the limitation that in so doing he was bound at his own expense to make and keep in repair a way over the water-course for the convenience of the public; in other words, to construct and maintain a suitable bridge. This familiar and well-settled rule of law does not in our opinion grow out of the feudal tenure, or of any peculiarity in the laws of England in relation to the duties of parishes, as argued by the defendant's counsel, but results, as we think, from the fact that the public right is a mere easement, and the owner of the soil, as such, can lawfully do any thing upon it that does not interfere with the public easement. *Perley v. Chandler*, 6 Mass. 454; *Adams v. Emerson*, 6 Pick. 57.

The canal was constructed to furnish water power for the mills, which at the time of the accident belonged to the defendant. He was not the owner of the soil under and adjoining the highway, or the canal, in the vicinity of the bridge, which the case finds was about a third of a mile from the mills. The owners of the land through which the canal flowed had sold lots of land to various purchasers at the place where the water power was to be applied, and in the deeds of conveyance had defined the proportions in which the grantees were to enjoy the use of the water, and also the proportions in which the expense of the necessary repairs upon the canal was to be divided between them. When all these various titles to the mill property met and were united in the defendant, he held the whole

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subject to the express obligation that he should pay for all necessary repairs upon the canal. It was manifestly and visibly an appendage of the mills, and the jury have found that he occupied and used it, and kept it in repair. Substantially it was his canal. The owners of the soil over which it flowed had no right to obstruct or divert the water. The easement, if it should be so considered, was exclusively his, and it was his use and occupation of the canal which created the necessity for maintaining the bridge and keeping it in good condition. If he occupied and used the canal, he also occupied that portion of the highway which was traversed by it, and apparently became subject to the same liability as if he were the original owner of the canal, and builder of the bridge at that point. *Perley v. Chandler*, 6 Mass. 454; *Lowell v. Spaulding*, 4 Cush. 277; *Milford v. Holbrook*, 9 Allen, 18.

But however this may be, the title deeds under which the defendant holds his property in the mills make him chargeable with the expense of keeping the canal in repair, and it would be a very narrow and literal construction of the language to say that this stipulation applies only to the sides and bottom of the canal, or means only that the water is to be confined to its proper channel. It includes more properly all parts of the canal, and every thing that is indispensable to its beneficial use. The bridge is substantially a part of the canal, and without it the canal would be an encroachment on public rights and liable as such to be filled up. The deeds do not in terms say that he shall personally make the repairs, but merely that they shall be at his expense. The jury find that after his purchase he made the repairs on the bridge, and they were rightfully instructed that, if he did so, it was sufficient evidence that he was maintaining it. Why was it not a practical construction of the deeds under which he holds his title, and an undertaking to do personally what if done by others would still be at his expense? There was evidence before the jury upon which in our judgment they were authorized to find that the defendant's son was his general agent, and acting with his sanction in taking charge of the real estate and making repairs upon it and the canal.

The special findings of the jury, which were rendered under instructions sufficiently favorable to the defendant, fully justify the conclusion that the defendant had assumed the support of the bridge and was the party bound by law to keep it in repair. Gen. Sts ch 44, § 26. *Commonwealth v. Deerfield*, 6 Allen, 455, and 2 Inst.

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700, there cited. The fact that he occupied the canal, and in so doing occupied that portion of the highway which was crossed by it, together with the express language of his title deeds, taken in connection with the fact of actual repairs upon the bridge by his authority, is quite sufficient to fasten upon him the legal liability, unless explained or rebutted.

The alleged defect in one of the defendant's title deeds (from Choate's assignee) is not material in this case. Even if the deed should ultimately prove wholly invalid, it is enough for the purposes of this trial that the defendant is in possession, claiming title, and to all appearance actually seized, controlling the property, and treating it as his own, without objection or adverse claim from any quarter.

The objection that the defendant was wrongfully compelled to undergo a cross-examination as to what he said to his counsel cannot be sustained. The policy of the law will not allow the counsel himself to make disclosures of confidential communications from his client; but, if the client sees fit to be a witness, he makes himself liable to full cross-examination like any other witness. This is true even as to defendants in criminal cases. *Commonwealth v. Mullen*, 97 Mass. 545.

Judgment on the verdict.

CROCKER *et al.* v. MARINE NATIONAL BANK OF NEW YORK.

(101 Mass. 240.)

National bank—place of action against.

A banking association organized under act of congress of 1864, chapter 106, can be sued in a State court, only in the city or county where it is located.

THE facts are stated in the opinion.

J. G. Abbott & H. C. Hutchins, for plaintiffs.

E. D. Sohler & C. A. Welch, for defendant.

GRAY, J. These actions are brought, the one by citizens of New York and the other by citizens of Massachusetts, against a banking

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association established in the city of New York, under the act of congress of 1864, chapter 106, entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof." The first question to be decided is that of jurisdiction; for, if the court has no jurisdiction, it has no authority to consider the merits of the actions.

The general principle is well settled, that civil cases arising under the constitution and laws of the United States may be tried and determined in the State courts, unless the national constitution and laws have vested exclusive jurisdiction of them in the federal tribunals; but that congress may prohibit the State courts from entertaining jurisdiction of such cases. 1 Kent's Com. (6th ed.) 396 *et seq.*; *Bank of United States v. Deveaux*, 5 Cranch, 85, 86; *Osborn v. United States Bank*, 9 Wheat. 738; *Teall v. Felton*, 1 Comst. 537; S. C., 12 How. 284; *Ward v. Jenkins*, 10 Metc. 591. The question in this case, therefore, depends upon the intention of congress, as manifested in the act of 1864.

The 8th section of that act declares that every banking association, formed and organized pursuant to its provisions, shall be a body corporate, with the usual powers of a corporation, and among others, to have a corporate name and seal, and "by such name it may make contracts, sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." If the act contained no further provision upon this subject, the corporations thus established might doubtless be sued, as well as sue, in the State courts of appropriate jurisdiction, and could be sued in only such courts of the United States as the citizenship of the parties would warrant. *Bank of United States v. Deveaux*; *Teall v. Felton* and *Ward v. Jenkins*, above cited.

But by the 5th section it is enacted that "suits, actions and proceedings against any association under this act may be had in any circuit, district or territorial court of the United States, held within the district in which such association may be established; or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases;" provided, however, that all proceedings to enjoin the controller of the currency under this act shall be had in a court of the United States.

The plaintiffs contend that this section, except the final proviso, is merely permissive, and does not exclude the bringing of such

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suits in any court, national or State, having jurisdiction in similar cases. But, according to their construction, so much of it as relates to courts of the United States would seem to have no effect except in the case of a plaintiff residing in the district in which the association is established; and so much as relates to the State courts would seem to be wholly useless and superfluous. And the effect would be, that, while a citizen of New York could not sue this association in any federal court held beyond the limits of that State, he might bring a suit against it in the courts of any State of the Union, by the laws of which a corporation established in another State might be sued, and in which it might be effectually served with process. *Folger v. Columbian Insurance Co.*, 99 Mass. 272.

Upon full consideration, we are unanimously of opinion that the construction of the act of congress for which the plaintiffs contend cannot be supported, and that the opposite construction must prevail. The whole purpose of the 8th section appears to have been to clothe the association with the attributes of a corporation, including that of suing and being sued. Unaccompanied by further legislation, that would have left the jurisdiction over suits against it to be regulated, according to the subject-matter involved or the parties interested, by the existing laws of the United States and the several States respectively. But the 57th section designates not only the judicial district of the courts of the United States, but the locality of the State courts, within which suits may be brought against such associations; and, by thus regulating the whole subject of suits against such corporations, so far supersedes all other rules, or, to speak more accurately, prevents them from ever applying to such suits. This section manifests the intention of congress that each of these associations should be sued, either in the federal or in the State courts, only in the judicial district in which it is established, and in which its officers may be summoned and its books brought into court with the least interruption and inconvenience of its business; and that the election of plaintiffs to sue in any court whatever should be confined within these limits in all cases.

Action dismissed for want of jurisdiction.

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GREEN v. HOLWAY.

(101 Mass. 242.)

Revenue stamps — omission does not invalidate instrument — unstamped instruments as evidence.

An unstamped instrument is not absolutely void, in the absence of proof that the stamp was omitted with intent to defraud the revenue.

The provisions in the United States Statutes of 1866, chapter 184, section 9, that no instrument, not duly stamped as required by law, shall be admitted or used in evidence in any court until a legal stamp shall have been affixed thereto, applies only to the courts of the United States.

THIS was an action on a written agreement, signed by defendant and dated May 11, 1867. The defense was interposed that the agreement was not duly stamped. At the trial it appeared that the contract, at the time of its delivery, bore no stamp, but that the plaintiff, a few days before the trial, affixed a stamp and canceled it with defendant's initials. It was insisted by defendant that the instrument was invalid and could not be used in evidence. The court so held, and judgment was rendered for defendant.

C. M. Ellis, for defendant.

I. D. Van Duzee, for plaintiff.

GRAY, J. The true meaning and effect of the act of congress, relating to stamps upon written instruments, under which this case arises, may be best reached by first considering the provisions of the previous acts, and the adjudged cases, upon the same subject.

The early stamp acts of the United States went no further than to declare that certain instruments and writings, not stamped as required by law, should not "be pleaded or given in evidence in any court, or admitted in any court to be available in law or equity," unless or until duly stamped. U. S. Stats. 1797, ch. 11, § 13 · 1813, ch. 53, § 7; 1 U. S. Stats. at Large, 531; 3 id. 79.

The internal revenue act of 1862, chapter 119, section 5, as originally passed, indeed provided that, if any person, after the 1st of October, 1862, should make, sign or issue any instrument, document or paper, of any kind or description whatsoever, without being duly

stamped, he should incur a penalty of \$50, "and such instrument, document or paper as aforesaid shall be deemed invalid and of no effect."

But, before that act went into operation, that section was amended by the act of 1862, chapter 163, section 24, which provided that no instrument, document or paper, made, signed or issued before the 1st of January, 1863, should be deemed invalid and of no effect for want of a stamp; but that it should not "be admitted or used as evidence in any court" until duly stamped. And the acts of 1863, chapter 4, section 5, and chapter 74, section 16, extended this time until the 1st of June, 1863, and authorized the paper to be stamped in the presence of the court. 12 U. S. Stats. at Large, 475, 561, 632, 725.

The internal revenue act of 1864, chapter 173, section 163, extended these provisions to all instruments, documents and papers signed or issued before its passage; prohibited them from being "recorded," as well as from being "admitted or used as evidence in any court;" and authorized stamps to be affixed "in the presence of the court, register or recorder respectively." That act also, in section 158, put the preceding provision into a less harsh and sweeping form, by enacting that any person who should make, sign or issue any instrument, document or paper, of any kind or description whatsoever, without its being duly stamped, "with intent to evade the provisions of this act," should be subject to a penalty, "and such instrument, document or paper shall be deemed invalid and of no effect;" with a provision that the title of a purchaser of land by a deed duly stamped should not be defeated or affected by the want of a proper stamp on any deed under which his grantor claimed title. 13 U. S. Stats. at Large, 293, 294, 295. Not only was the last proviso inconsistent with the theory that all unstamped instruments were wholly void; but the second of the previous provisions of this section declared void only "such instrument, document or paper," requiring a reference to the first provision of the same section in order to explain the meaning of the word "such."

United States v. Gooding, 12 Wheat. 477. And it has, therefore, been held, by this and other courts, that the second provision, declaring unstamped instruments to be void, like the first provision, imposing a penalty, applied to those instruments only on which a stamp had been omitted with intent to evade the provisions of the act. *Tobey v. Chipman*, 13 Allen, 123; *Wiley v. Robinson*, id. 128;

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Hitchcock v. Sawyer, 39 Vt. 412; *Harper v. Clark*, 17 Ohio St. 190.

The internal revenue act of 1865, which took effect on the 1st of April, 1865, did not touch section 163 of the act of 1864, but substituted for section 158 another section in like terms, with additional provisions, authorizing any instrument made or issued without stamps to be subsequently stamped, upon application to the collector of internal revenue for the district, and payment to him of the price of the proper stamp, and either payment of the penalty, or proof, to his satisfaction, within twelve months after the making or issuing of the instrument, that it had not been then duly stamped "by reason of accident, mistake, inadvertence or urgent necessity, and without any willful design to defraud the United States of the stamp duty, or to evade or delay the payment thereof." U. S. Stats. 1865, ch. 78, § 1; 13 U. S. Stats. at Large, 481, 482. Means were thus provided of obtaining a conclusive certificate, upon the instrument itself, of a faithful compliance with the law. In the case of the collector's affixing the stamp, upon payment of the penalty, it was expressly declared that the instrument should "thereupon be deemed and held to be as valid, to all intents and purposes, as if stamped when made or issued;" but in the other alternative, of proof that the stamp had been omitted without fraudulent intent, it was merely provided that the collector might "remit the penalty aforesaid, and cause such instrument to be duly stamped," by this difference clearly implying that instruments made or issued unstamped, without fraudulent intent, were not void by force of the previous provisions, and did not, therefore, need to be declared valid upon being subsequently stamped. It has, accordingly, been generally held that, under the act of 1865, as under that of 1864, no instrument was void, the stamp on which had not been fraudulently omitted. *Tobey v. Chipman*, 13 Allen, 123; *Govern v. Littlefield*, id. 127, note; *Lynch v. Morse*, 97 Mass. 458, note; *McGovern v. Hoesback*, 53 Penn. St. 177; *Dudley v. Wells*, 55 Me. 145; *Whitehill v. Shickle*, 43 Mo. 537; *Hallock v. Jaudin*, 34 Cal. 167.

In some States, indeed, instruments executed while the acts of 1864 and 1865 were in force, on which stamps had been omitted without fraudulent intent, have been held to be void. *Hugus v. Strickler*, 19 Iowa, 413; *Miller v. Morrow*, 3 Coldw. 587; *Maynard v. Johnson*, 2 Nev. 16; *Wayman v. Torreyson*, 4 Nev. 124. But the courts that have so decided do not appear to have had before them

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any of the opposing decisions above cited, which we cannot but consider more reasonable as well as more authoritative.

The internal revenue act of 1866, which took effect on the 1st of September, 1866, and was in force at the date of the agreement now sued on, substituted, in the stead of section 158, an enactment in substantially the same words, so far as this case is concerned, except in inserting the words "not being stamped according to law" in the second provision of that section, so as to make it read "and such instrument, document or paper, not being stamped according to law, shall be deemed invalid and of no effect;" and instead of section 163, a section providing that no instrument, document, writing or paper, signed or issued without being duly stamped, should be "recorded, or admitted or used in evidence in any court, until a legal stamp or stamps, denoting the amount of the tax, shall have been affixed thereto as prescribed by law," but omitting the clause authorizing instruments to be stamped in the presence of the court, register or recorder. U. S. Stat. 1866, ch. 184, § 9; 14 U. S. Stats. at Large, 142-144.

In *Carpenter v. Snelling*, 97 Mass. 452, it was held that the provision last quoted applied to the courts of the United States only, and did not affect the rules of evidence in the State courts; and it was assumed, and was indeed necessarily involved in the decision, upon the ground on which it was put by the court, that, under the act of 1866, as under the previous laws, the omission to affix a stamp, if by inadvertence or mistake, and without intent to defraud the revenue, did not render the instrument wholly void. It would seem, indeed, that the point need not have been decided in that case, because there was no legal deficiency of a stamp, since the omission to stamp a writing of defeasance could hardly, upon any just construction of this statute, be deemed to invalidate the absolute deed, executed as part of the same transaction, and itself duly stamped, under which the defendant claimed title. See *Peate v. Dicken*, 1 Cr. M. & R. 422; S. C., 5 Tyrwh. 116. But that consideration, although mentioned by the court, was not the *ratio decidendi*; and the judgment went upon the ground that, assuming the instrument in question not to have been stamped in accordance with the provisions of the statute, it was still, in the absence of proof of fraudulent intent, valid, and admissible in evidence in the courts of this commonwealth.

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Upon re-examination, we see no reason to be dissatisfied with that decision, or with the ground on which it rests.

Statutes imposing a stamp tax for the increase of the revenue have not commonly declared instruments to be void, upon which the requisite stamps have been omitted without fraudulent intent; and such an effect is not to be implied. *The King v. Bishop of Chester*, 8 Mod. 364; S. C., 1 Stra. 624; Bac. Ab. (Wilson's ed.) Stamps F.; *Bristow v. Sequeville*, 3 C. & K. 64; S. C., 5 Exch. 275. Acts imposing duties of any kind are not to be extended by doubtful interpretation, but are to be construed by the rule that every charge upon the subject must be created by clear unambiguous words. *Wroughton v. Turtle*, 11 M. & W. 567, and cases cited; *Sewall v. Jones*, 9 Pick. 414; *Adams v. Bancroft*, 3 Sumn. 384; *United States v. Wigglesworth*, 2 Story, 369; *United States v. Eighty-four Boxes of Sugar*, 7 Pet. 453. A statute, like the present stamp act, including not only deeds and instruments which pass title, but every kind of promise or contract, executed or executory, should not, without clear manifestations of legislative intent, be construed so as absolutely to annul all writings, to which by mistake, oversight or misunderstanding, however innocent or excusable, stamps of the requisite amount have not been affixed.

The insertion of the words "not being stamped according to law," in the provision of the stamp act declaring instruments to be void, does not necessarily change or extend the operation of that provision, and could not well be held to do so, consistently with the other provisions re-enacted in the same section, the nature and effect of which it may be well to recapitulate in their order and in a connected series. The section, in its present shape, as in the former acts, does not declare all instruments not duly stamped to be void, but only "such" as have been already mentioned, that is to say, those that fail to have a proper stamp by reason of its having been omitted with intent to defraud the provisions of the act. It provides that a person claiming title under an unstamped deed may convey a good title by deed duly stamped; and a deed not stamped as required by the act has been therefore held to be a valid consideration for a promissory note. *Lambert v. Whitelock*, 29 Ind. 26. It allows a stamp to be subsequently affixed on application to the collector and payment of the stamp duty. While, if a stamp is so subsequently affixed after payment of the penalty (which is incurred only if the stamp has been originally omitted with intent to defraud the provis-

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ions of the statute), it is expressly declared that the instrument shall thereupon be deemed as valid as if originally stamped; such a declaration is omitted, and assumed to be unnecessary, in the case of a stamp so affixed upon proof that it has been omitted without fraudulent intent. The only reasonable construction of all these provisions, taken together, is, that an instrument not duly stamped at first is not by reason thereof absolutely void, but only voidable by proof that the stamp was omitted with intent to defraud the revenue, made before it has been duly stamped on application to the collector, or, if the instrument is one which passes title, before that title has been conveyed away by the grantee by an instrument duly stamped.

This construction is strengthened by the enactment in the subsequent section, that no instrument or paper, signed or issued without being duly stamped, "shall be recorded, or admitted or used as evidence in any court," until the proper stamp shall have been affixed thereto; for if the instrument, by reason of the mere omission of the stamp from whatever cause, were absolutely void, it would be superfluous to provide that it should not be admitted or used in evidence.

The decision in *Carpenter v. Snelling*, 97 Mass. 452, that this enactment must be limited to the courts of the United States, and not be construed to extend to, if indeed it could constitutionally bind, the State courts, was made after full consideration; is in accordance with the judgments rendered, without a doubt being raised upon this point, by the supreme courts of Vermont, Maine and Pennsylvania in the cases above cited, and with the latter adjudication of the very question in *Griffin v. Ranney*, 35 Conn. 239; *Craig v. Dimock*, 47 Ill. 308; *Bunker v. Green*, 48 id. 243, and *United States Express Co. v. Haines*, id. 248; and is in harmony with, if it does not fall within, the principle of construction upon which the amendments of the constitution of the United States securing fundamental rights in the modes of judicial proceedings have been held to apply to such proceedings in the courts of the United States only and not to those in the courts of the several States. *Twitchell v. Commonwealth*, 7 Wall. 321, and cases cited; *Livingston v. Moore*, 7 Pet. 482, 551; *Commonwealth v. Hitchings*, 5 Gray, 482.

We are aware that the supreme court of New York, in an early case, held that under a similar provision in the act of 1797, chapter 11, section 13, a note not stamped as required by that act could not be

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given in evidence. *Edeck v. Ranuer*, 2 Johns. 423. But the case was submitted without argument, and was decided before the effect of acts of congress upon the jurisdiction and practice of the State courts had been the subject of thorough judicial examination. The attention of the court does not appear by its opinion as delivered by Mr. Justice SPENCER, to have been directed to the question whether the rule of evidence prescribed by the stamp act was applicable to the courts of the State; but to the single question of the repeal of that act by the act of congress of 1802, chapter 19, with provisions allowing the recovery and distribution of fines already incurred, and the stamping, by the collector of customs, of instruments not duly stamped. And it was afterward held by the same court, upon much consideration, in an opinion delivered by the same learned judge, that congress could not confer upon the State courts jurisdiction of suits for the recovery of similar fines. *United States v. Lathrop*, 17 Johns. 4. We are not informed of any other case in which the provision of the stamp act regulating the admission of unstamped instruments in evidence has been applied in a State court, except that of *Plessinger v. Depuy*, 25 Ind. 419; and in that case also the question of its applicability does not seem to have been considered.

On the other hand, it has been said in Illinois and Kentucky, that to declare contracts not stamped to be wholly void was beyond the constitutional power of congress. *Latham v. Smith*, 45 Ill. 29; *Hunter v. Cobb*, 1 Bush, 239. We should not be prepared to adopt that view, without stronger reasons than are stated in those cases, especially since the judgments of the supreme court of the United States in the *License Tax Cases*, 5 Wall. 462, and *Pervear v. Commonwealth*, id. 475. And a consideration of its soundness is not requisite or proper in this case, in which we are of opinion, for the reasons already stated, that congress has not undertaken to exercise such a power. If congress has the power at its discretion of declaring that all unstamped instruments shall be absolutely void, it does not follow that the exercise of so extreme a power is to be easily inferred; or that congress can, without so declaring, control the rules of evidence in the State courts, or the duties of recording officers under State laws; still less, that the assumption by such a control on the part of congress is to be presumed without the clearest manifestation by intention in the words of the statute. The late decisions by the supreme court of Illinois, already cited,

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are put upon grounds more accordant with our judgment in this case.

The result is, that as no evidence was offered that the stamp upon the contract in suit had been omitted with fraudulent intent, the learned judge erred in sustaining the defendants' objection, and the plaintiff is entitled to a new trial.

NOTE.—That the omission of a stamp does not, in the absence of proof of intent to defraud, render an instrument void, has been held in the following additional cases. *Crocker v. Foley*, 13 Allen, 376; *Holyoke Co. v. Franklin Co.*, 97 Mass. 150; *Vaughan v. O'Brien*, 57 Barb. 491; *Hunt v. Bates*, 40 Ala. 470; *Dorris v. Grace*, 25 Ark. 222.—RUP.

SHIPLEY v. FIFTY ASSOCIATES.

(101 Mass. 251.)

Negligence—injuries by ice and snow falling from buildings.

The plaintiff, while passing along a highway, was injured by a mass of ice and snow falling upon her from the roof of defendants' building. In an action to recover damages *held*, that the defendants were liable, although the building was occupied by tenants who had covenanted to keep the premises in repair, as it did not appear that the roof was under their control.

ACTION to recover damages for injuries received from a mass of ice and snow falling upon the plaintiff from the roof of defendants' building. The question was reserved for the full court, whether or not plaintiff could recover upon her offer of proof, the substance of which is stated in the opinion.

J. D. Ball & J. P. Treadwell, for plaintiff.

C. A. Welch, for defendants.

CHAPMAN, C. J. The plaintiff offers to prove that Union street was a public highway in Boston, and that the sidewalk was a part of the highway; that she was traveling on the sidewalk, using proper care, and as she passed by the defendants' building a great quantity of snow and ice slid from the roof, fell upon her and greatly

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injured her. She further offers to prove that the snow and ice had remained on the roof for an unusual and unreasonable length of time after the defendants had full knowledge thereof, and might have been removed before that time.

The purpose of making highways is, as expressed by the statute, to provide a way for travelers that shall be "safe and convenient." The statute prescribes the duty of towns, and makes them liable if they neglect to perform their duty. But individuals are also liable for any injuries they may do by interfering with the safety and convenience of travelers. If the defendants had suffered the snow and ice to accumulate upon an awning placed by them over the walk, and the awning, being insufficient to hold the snow and ice, had given way and injured the plaintiff, they would have been liable. *Millford v. Holbrook*, 9 Allen, 17.

In this case, it does not appear that the roof projected over the walk, but was so constructed that the snow and ice collected upon it would slide off in a large mass and come down upon the walk. It cannot be doubted that the proprietor of land adjoining a highway may erect upon it a structure that will catch the falling rain and snow, and retain it till it becomes a large mass, and allow it to freeze and thaw. But the question here is, whether he may construct his roof in such a manner that, after the mass has accumulated, it will in certain states of the weather be projected by its own weight upon the sidewalk. If he may, then the risk is upon travelers, and they must take notice that, at certain seasons, the sidewalks are not safe or convenient for travel, but must be avoided.

The general doctrine as to the use of property is *Sic utere tuo ut alienum non lædas*. It would be difficult to state a reason why the rule should not be applied to a case like this. It cannot be contended that an exception exists on the ground of necessity; for the roof can be so constructed that the snow will not slide from it upon the sidewalk in masses; and if it gathers in masses, it can be removed by artificial means, without exposing travelers to danger. The rule is applied in cases quite analogous to this. If one fixes a spout or a cornice which gathers the water that falls upon his roof, and throws it upon his neighbor's land, an action lies. *Reynolds v. Clarke*, 2 Ld. Raym. 1399; S. C., 1 Stra. 634; *Fay v. Prentice*, 1 C. B. 828; *Bellows v. Sackett*, 15 Barb. 96. If one's real estate is thus protected, certainly his person must be equally protected. If the water may not be thrown upon his land, it may not be thrown upon

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his head while he is standing on his land. A traveler in the use of a highway is as much entitled to protection as if he were the owner in fee-simple. And, as a formal proposition, it is true that any act of an individual, though performed on his own soil, if it detracts from the safety of travelers, is a nuisance. *Dygert v. Schenck*, 23 Wend. 447. The principle stated by Lord CRANWORTH in *Rylands v. Fletcher*, Law Rep. 3 H. L. 330, that, "if a person brings or accumulates on his land any thing which, if it shall escape, may cause damage to his neighbor, he does so at his peril, is applicable to this case. In that case, the defendant had accumulated water in a reservoir, to work his mill; it escaped and injured his neighbor's coal mine, because the defendant's engineer had neglected to block up certain shafts that led from the reservoir to the mine; and the defendant was held liable. He had a right to accumulate the water on his premises in that case, as the defendants had a right in this case to accumulate the snow, but he was bound to use due care to prevent it from escaping and injuring his neighbor."

But the defendants contend that they are not liable, because they were mere landlords, and not occupants of the building; and they rely upon the principle stated in *Kirby v. Boylston Market Association*, 14 Gray, 249, that the occupier and not the landlord is bound, as between himself and the public, so far to keep the buildings and other structures abutting on a common highway in repair, that the way may be safe for the use of travelers. But it was held in that case that, only the separate parts of the building being let, and a general supervision of the whole having been retained by the landlord, the principle did not apply. It was also held that, if the plaintiff, while using the highway, suffered special damage by a nuisance created by the defendants, they were liable. The general principle undoubtedly is, that a landlord is not liable for a nuisance which is caused by the act or neglect of his tenant. If the whole of the building in this case had been rented, the question might arise whether the nuisance consisted in the roof, which, at the time of making the lease, was so constructed as to collect snow and ice, and project it into the street; or in the neglect of the occupant to remove it at a proper time and in a proper manner. But it does not appear that the place where the snow and ice accumulated was under the control of tenants. The defendants had leased to one tenant, for the term of five years from July 20, 1865, the lower floor and cellar, reserving a scuttleway. There is nothing in this lease

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that transfers any right to use or control the roof. They had also leased to another tenant, for the term of five years from October 19, 1865, "all the chamber stories," reserving certain rights. This conveyed no right to use or control the outside of the roof. Each lease required the tenant to keep the premises leased to him in repair, with the usual exceptions, but reserved to the lessors a right of entry to view and make repairs. The building did not cover the whole lot. We cannot construe these leases as excluding the lessors from going upon the roof, or as relieving them from obligation as owners to remove whatever substances might gather upon it and become a nuisance to travelers on the highway.

Case to stand for trial.

TOMBS *et al.* v. ALEXANDER.

(101 Mass. 255.)

Broker — compensation to.

The defendant employed a broker to sell certain real estate for a fixed compensation, advising him of his title; the broker found a customer, and brought him to the defendant, but no sale was effected on account of the defective condition of defendant's title. The property was afterward sold by the defendant at auction to a third person, and brought a higher price than the said customer had once offered. *Held*, that the broker was entitled to no compensation on the contract for services.

ACTION to recover for services rendered by a broker.

At the trial the judge found the following facts:

"The defendant employed the plaintiffs, who were real estate brokers, to sell for him the estate for the agreed price for their services of \$50; and, at the time they were so employed, stated to them the source of his title, and how he held the same, and that he could give a warranty deed of the same; and the plaintiffs told him that they thought they could sell it for him. Afterward Napoleon B. Sowdon was found by the plaintiffs, and by them sent to the defendant, as a person desirous of buying the estate. The plaintiffs

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did not take from Sowdon, nor did he sign any agreement in writing to buy the estate, nor was any money paid by him to them or to the defendant, on account of said bargain. The defendant then stated to Sowdon the source of his title to the estate, and afterward they bargained together for the purchase and sale of the estate, fixing the terms of sale and price, and the defendant delivered to Sowdon, at his request, all of the mortgages and other papers, for the purpose of explaining to him the condition of his title to the property. No services were rendered by the plaintiffs except sending Sowdon to the defendant. The defendant claimed to hold the estate by virtue of a foreclosure of a mortgage; and also held a second mortgage on it, which contained a power to sell for condition broken, and was in the usual form of power of sale mortgages. Sowdon employed counsel to investigate the defendant's title, who reported that it was incomplete, the foreclosure never having been perfected; and then, Sowdon having communicated to the defendant the advice given by the counsel, the defendant agreed and undertook to sell the estate at public auction, according to the conditions of the power contained in his second mortgage, Sowdon agreeing to purchase said property at the auction sale. The property was accordingly advertised; and, about a week after the first interview, Sowdon informed the defendant that he had purchased another place, for which he had been negotiating before seeing the defendant's property. At the sale of the estate at public auction, it was bought by Thomas Preston, at a sum greater than that at which the defendant agreed to sell to Sowdon. Testimony was offered by the defendant, showing that it was the usage of real estate brokers to make no charge for services unless a sale was effected by them; but the witnesses stated, on cross-examination, that they did not know of a case within their experience such as the present one."

Judgment for defendant. Plaintiffs appealed.

W. W. Doherty, for plaintiffs.

T. Weston, Jr., for defendant.

CHAPMAN, C. J. The plaintiffs contend that they, as real estate brokers, found a purchaser for the defendant's property, and brought the parties together, and thereby became entitled to com-

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pensation. But the bringing of parties together includes the idea of their being bound to each other in a valid contract. *Cook v. Fiske*, 12 Gray, 491. If the broker finds a party willing to purchase, and his employer revokes his authority and refuses to sell, it has been held that the broker may recover a compensation for the services he has rendered. *Prickett v. Badger*, 1 C. B. (N. S.) 296. But that is not the present case. The defendant employed the plaintiffs to sell for him the estate, for an agreed price, and stated to them the source of his title, and how he held the same, and that he could give a warranty deed of the same. The plaintiffs found a person who was desirous to purchase, but did not require him to enter into a legal contract. They sent him to the defendant, who agreed with him orally upon the terms of the purchase; but the person took time to examine the title, and, being dissatisfied with it, declined to purchase. The oral contract not being binding, the parties were not brought together so as to entitle the plaintiffs to their compensation. The defendant was not at fault; for he made a disclosure of his title, and did all he could to complete the sale.

But he did sell the property; and the sale was made in consequence of an agreement made between him and Sowdon, the customer furnished by the plaintiffs, that it should be sold at auction. It brought a larger price at the auction than Sowdon had agreed to pay. The plaintiffs contend that on this ground they are entitled to recover. But the plaintiffs had no connection with this sale, except a very remote one, and are not entitled to claim any agency as brokers in its procurement. If it had brought less than the price agreed on between the defendant and Sowdon, it would have been the defendant's misfortune. The fact that it brought more is his good fortune, for which the plaintiffs cannot claim compensation.

Exceptions overruled.

Walker v. Tirrel.

WALKER, appellant, v. TIRREL.

(101 Mass. 287.)

Broker — compensation of.

The defendant sent a proposal to a broker in these words: If you send or cause to be sent to me, by advertisement or otherwise, any party with whom I may see fit and proper to effect a sale or exchange of my real estate, above described, I will pay you the sum of \$200. The broker found a person who proposed to purchase the property, but the sale was not effected. *Held*, that the broker was not entitled to compensation.

ACTION on a written contract for alleged services rendered thereupon by a broker. There was also a claim for services, in a separate count, rendered in negotiating a sale. The verdict was for defendant. Plaintiff appealed. The facts are further stated in the opinion.

I. D. Van Duzee, for plaintiff.

N. C. Berry, for defendant.

CHAPMAN, J. The defendant's contract was in a writing making the following proposal: "If you send, or cause to be sent to me, by advertisement or otherwise, any party with whom I may see fit and proper to effect a sale or exchange of my real estate above described, I will pay you the sum of \$200." Above it was a description of the real estate referred to. The plaintiff declares on this contract, alleging its performance on his part; and adds a general count for his services in the performance of it.

But though he made all proper efforts, and found a person who offered to purchase the property, he did not find one with whom the defendant saw fit and proper to effect a sale or exchange. Thus it appears that the compensation is not due by the terms of the contract.

He might have a claim for services if the sale or exchange had failed through the fault of the defendant, upon the principle stated in *Prickett v. Badger*, 1 C. B. (N. S.) 296, and *Cook v. Fiske*, 12 Gray, 491. But no such fact appears. The defendant expressly reserved the right to exercise his own judgment as to the fitness and propriety of making a sale to any person who might offer to

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purchase. There might be many good reasons for reserving such a right; and it was legal to make a contract on those terms. The plaintiff might have required him to stipulate that he should assign good reasons for refusing to sell or exchange; and in such case it would have been necessary to pass upon the validity of the reasons assigned by him. But the plaintiff did not require such a stipulation, but agreed to leave the matter to his judgment without requiring him to assign any reasons. The effect of this was to throw upon the plaintiff the risk of satisfying him. The compensation, then, by the terms of the agreement, was made to depend upon the completion of the sale or exchange. The court cannot see that the compensation, in case of the completion of the contract, was not made larger in view of the risk. But this is not material. The point to be decided is, what are the terms of the contract; and, as it is found to contain a condition which has not been fulfilled, the plaintiff is not entitled to recover upon it; and, as it does not appear that the defendant is in fault, the plaintiff cannot recover upon a *quantum meruit*.

Exceptions overruled.

THOMPSON V. KELLY.

(101 Mass. 291.)

Auction sale — mistake in advertisement — action in name of auctioneer.

A house fitted only with cold water was advertised for sale at auction as fitted with "hot and cold water," and subject to examination at any time before sale. The mistake was announced by the auctioneer at the opening of the sale. The property was sold to K., who had read the advertisement, but had not examined the house nor heard the announcement as to the mistake. He signed the agreement to comply with the terms of sale, one of which was that the purchaser should pay the auctioneer \$200 to bind the bargain, and forfeit that amount if he failed to comply with the terms. At the head of this agreement was the advertisement with the words "hot and" erased. On examining the house and finding no hot water fixtures, K. refused to complete the sale or pay the \$200. In an action by the auctioneer for that sum *held*, that the sale was binding and that the action was properly brought in the name of the auctioneer.

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ACTION on contract to recover the amount of \$200 alleged to be due the plaintiffs, who were auctioneers in Boston, under the conditions of an agreement conversant about the sale of a house on Dwight street. The facts are set forth in the report of the judge before whom the trial was held. The advertisement, agreement, and memorandum which accompanied the report are as follows:

“Brick dwelling-house on Dwight street. On Friday, October 5, at 3 o'clock, P. M., on the premises. The 3½ story brick dwelling-house, No. 12 Dwight street, containing 11 rooms, with gas,——— cold water, fittings, etc., and is in good repair. Will be sold without reserve upon favorable terms of payment. May be examined at any time before the sale. For key, terms and further particulars, apply to the auctioneers.

“Boston, October 5, 1866. I hereby acknowledge to have this day purchased by public auction of Newell A. Thompson & Co., auctioneers, the estate set forth in the above-printed advertisement, for the sum of \$5,950, and I agree to comply with the terms of the sale as stated by the auctioneer, and hereto annexed; and, having paid into the hands of the auctioneer the sum of dollars, agreeably to the said terms of sale, I hereby agree to forfeit said sum to the use of the seller, should I fail to comply with the residue of said terms.

“PATRICK KELLY.

“The above sale is hereby confirmed.

“ROBERT S. GARRETT, for the heirs of Robert Garrett.

“Memorandum of Terms and Conditions of Sale. One week to ten days given to examine title, and if upon examination of the records it shall appear that any material act or thing is necessary to be done or performed, in order to perfect the title to said premises, which the seller is unable to do or perform within a reasonable time, not exceeding twenty days from the date hereof, then the sale to be void at the option of either party. Purchaser to pay one-half of the taxes for the current year, as assessed on May 1, 1866. Property sold subject to no existing mortgage. The whole amount of the purchase-money to be paid in cash on delivery of the deed, or at the option of the purchaser one-third in cash and residue in one and two years, with interest at six per cent per annum, payable semi-annually, secured by power of sale of mortgage on premises. Two hundred dollars to be paid down into the hands of the auctioneer

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to bind the bargain, and to be forfeited to the use of the seller in case the purchaser shall fail to comply with the residue of the terms of the sale, or refunded to him in case of a material defect in the title which cannot be remedied as above provided. But a forfeiture of said sum shall not release the purchaser from his liability under this contract. Rents and interests to be made square to the day of delivery of deed. Settlement to be made and deed to be delivered at office of auctioneer at or before the expiration of ten days from day of sale."

The report is as follows :

" At the trial, McClellan, one of the plaintiffs, testified that the plaintiffs were auctioneers, and as such had advertised for sale the premises described in the agreement declared on, and that the advertisement, as it appeared in the newspapers, stated that the premises had hot and cold water fittings; that the agreement, afterward signed by the defendant, was drawn up in the plaintiff's office, on the morning of and before the sale, and that, having ascertained that the premises had no hot water fittings, the words "hot and" were erased from the advertisement, which was cut from a newspaper and attached to the agreement and made a part of it. At the auction, Thompson, who made the sale, announced the terms upon which the sale would be made, reading from the agreement, and announced that the advertisement contained an error, as there were no hot water fittings in the house. The bidding then commenced, and the premises were knocked down to the defendant. The agreement was then executed by the defendant and Garrett. The defendant then said he had not the two hundred dollars with him, but would go to the store and get it, and meet the witness at the office of the plaintiffs and pay it. The witness locked up the house and gave the keys to the defendant, and walked with him part of the way to the plaintiffs' office, when the defendant left to go and get the money, but did not come to the office, nor did the witness see him afterward, nor was the money ever paid, although the keys were sent to the plaintiffs' office. The witness did not know whether the defendant was present when Thompson announced the terms of sale; did not see him until he came forward to sign the agreement; and did not recollect whether the defendant read the agreement before he signed it, although he had the opportunity of doing so. The plaintiffs then put in evidence the agreement, under the defendant's objection.

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"The defendant testified that he read the advertisement as it appeared in the newspapers, and went to the sale; that he did not arrive until after the sale had commenced, and did not examine the house, and did not hear the statement that there were no hot water fittings; that he bid off the house at the price named in the agreement, and signed the paper with his pencil, the papers being held up against the wall by McClellan; that he did not read the whole of the papers, and did not know that the words "hot and" had been erased from the printed advertisement, which was pasted on the top of the papers he signed; that he walked down with McClellan and asked him for the keys, that he might look at the house, and told him if the house was all right he would come up in an hour and pay the two hundred dollars; that he did look at the house and found it had no hot water fittings, and returned the keys to the plaintiffs' office, and informed them that he should not take the house. This closed the defense.

"McClellan was again placed upon the stand, and denied that the defendant asked him for the keys, or that he said he would look at the house and if it was all right would come up in an hour and pay the two hundred dollars, but testified that he gave the defendant the keys as the purchaser, and that what the defendant said when he left him was, that he would come up in the course of an hour and pay the two hundred dollars. On cross-examination the witness testified that (Kelly having refused to comply with the conditions of the sale) the plaintiffs had advertised the house and sold it on the account of Patrick Kelly, the defendant, at which sale it brought thirty dollars more than the defendant had bid for it at the time of his purchase. This was all the evidence in the case.

"Upon these facts the judge ordered a verdict *pro forma* for the plaintiffs, which was rendered, and by request of the parties reported the case for revision, that judgment might be entered upon the verdict or a new trial ordered, as the supreme judicial court should determine."

C. R. Train, for plaintiffs.

L. Child & L. M. Child, for defendant.

WELLS, J. The report does not state what questions were intended to be presented to this court. The defendant was clearly

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entitled to go to the jury upon the testimony. But he makes no point in the argument here, that he was wrongly deprived of that right. We assume, therefore, that the verdict was ordered for the plaintiffs with his assent; and that he did not desire to argue to the jury upon the force of the testimony.

We cannot undertake to decide questions of fact. We can only take the testimony as reported, giving it full effect so far as uncontradicted, and, in all points of disagreement, assuming that of the defendant to be true; and if, upon the testimony so considered, there appears to be a *prima facie* case for the plaintiffs to which there is no legal defense shown, the verdict must stand.

No question is made upon the pleadings. The two principal questions presented for our consideration are: 1st. Whether the action can be maintained in the names of the plaintiffs. 2d. Whether the mistake, under which the defendant signed the memorandum of sale, was such as entitled him to repudiate the purchase.

1. In case of personal property, an auctioneer, employed to sell, may ordinarily maintain an action for the price, or for the property itself. Chit. Con. (10th Am. ed.) 252; 1 Chit. Pl. (6th ed.) 7, 8; Story on Agency, §§ 27, 107, 397; *Tyler v. Freeman*, 3 Cush. 261. This doctrine stands upon the right of the auctioneer to receive, and his responsibility to his principal for, the price of the property sold, and his lien thereon for his commissions; which give him a special property in the goods intrusted to him for sale, and an interest in the proceeds. In case of real estate, he can have no such special property, and would not ordinarily be held entitled to receive the price. But when the terms of his employment, and of the authorized sale, contemplate the payment of a deposit into his hands at the time of the auction, and before the completion of the sale by the delivery of the deed, he stands, in relation to such deposit, in the same position as he does to the price of personal property sold and delivered by him. He may receive and receipt for the deposit; his lien for commissions will attach to it; and we see no reason why he may not sue for it in his own name, whenever an action for the deposit, separate from the other purchase-money, may become necessary.

In this case, if there was an effectual sale, the amount of the deposit due, by its terms, not having been paid at the time, there is an implied promise to pay it. That promise inures to the benefit of the party legally entitled to receive the deposit. It is not merged

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in the written agreement, because that writing clearly excludes it as a matter already otherwise provided for. There is also a subsequent express promise to pay the amount, coupled only with the condition "if the house is all right." The defendant does not deny that the house was "all right," except in the particular upon which he seeks to defeat the entire sale.

The memorandum is sufficient to take the case out of the statute of frauds.

The plaintiffs, it is true, are not parties to the written instrument. But they do not sue, and it is not necessary that they should sue, upon the writing. The obligations in relation to the deposit are outside of that, and are so recognized by the writing itself.

2. The mistake, for which the defendant seeks to avoid the contract of sale, was not occasioned by any fault of the plaintiffs. It did not affect the identity of the property which was the subject of the sale. The error in the advertisement does not appear to have been otherwise than in good faith, and was corrected and explained when the property was offered for bids. The defendant, without previously examining the property, and not having been present at the opening of the sale, when statements and explanations in relation to the property offered might reasonably be expected to be made, took no precaution to inquire, but relied wholly upon the published advertisements. He contented himself with reading a part only of the memorandum which was placed before him for signature, and which exhibited the modification in the description of the property, by an erasure of "hot and" from the printed advertisement attached. It does not appear that the plaintiffs, or Garrett, in any way conducted so as to mislead him, or induce him to forego scrutiny or inquiry; nor that either of them knew, or had reason to suppose, that he was thus misled, or that he was not present when the alteration of the advertisement was explained. Upon his own statement, we do not think he makes such a case of mistake as entitles him to be released from his contract.

Judgment on the verdict.

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AMMIDOWN V. FREELAND *et al.*

(101 Mass. 308.)

Constitutional law—recovery of subsequently imposed duties in cases of contract.

The act of congress of 1864, chapter 173, section 94, which authorizes persons who before its enactment had made contracts without other provision therein for the payment of duties subsequently imposed on articles to be delivered under them, to recover from the purchaser a sum equivalent to the duties so imposed if the same had not been previously paid by him, is constitutional; and such sum may be sued for and recovered in either a federal or State court.

THIS was an action to recover a sum paid as duties upon woolen goods under United States statutes of 1864, chapter 173, section 97.

On the 25th of June, 1864, the plaintiff by a written contract sold to defendant, for a price stated, a large quantity of army cloth and army blankets, to be delivered in equal monthly lots, during six months, beginning August 1, 1864. The goods were delivered according to the contract. The plaintiff procured the cloth and blankets from the manufacturers, under a contract made June 16 and June 23, 1864. The manufacturers paid to the United States the additional duty imposed on the cloth by the above act of 1864, and brought suit against the plaintiff for the amount which is still pending. The additional duty on the blankets was paid by the manufacturer and the amount refunded to him by the plaintiff.

“The plaintiffs, from time to time, as goods were delivered under their contracts, rendered bills to the defendants wherein the goods were charged at the prices stipulated in the contracts, without adding thereto the amount of the additional duty; the defendants made payments from time to time, on account of the goods so delivered; and the plaintiffs made no claim that they were entitled to any additional sum by reason of said increased duty, until after the passage of the act of congress and the delivery of the goods. On June 24, 1865, upon receipt of a partial payment by the plaintiffs, they addressed to the defendants a letter, which was duly received by the defendants,” the material part of which was as follows: “In order that you may not forget the matter, or lose opportunity for collecting of the government, we inclose copies of the collector’s

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certificates of the amount of extra tax paid on the infantry cloths delivered you under the old contract of June 25th, and which is payable by you. We charged you the amount in account. There is also a similar claim for tax on the blankets; but we have not yet received the collector's certificates." "Thereafter, payments were made, from time to time, by the defendants, and a correspondence was carried on between the parties as to their mutual claims, wherein the plaintiffs claimed the amount of the extra tax. On or about April 12, 1866, a settlement was made by correspondence, in which the goods were paid for by the defendants at the stipulated prices, leaving the claim for the amount of the extra tax for future adjustment.

"The defendants, before such claims had been made upon them by the plaintiffs, had contracted to furnish clothing to the United States, to be manufactured from the cloth, with other materials, and had manufactured and delivered such clothing; had sold and delivered the blankets to the United States, and rendered bills therefor, without adding to the price thereof the amount of the additional duty, and without any stipulation in regard to the payment or re-imbursement thereof; and the United States never re-imbursed the same, and denied any obligation to do so. The plaintiffs knew, at the time they entered into the written contracts with the defendants, that the goods contracted for were intended to be sold by the defendants to the United States, and delivered a portion of them to the agents of the United States. The contracts between the defendants and the United States were dated after the passage of the act imposing an additional duty, which was one of the grounds of defense set up by the United States against liability to re-imburse said duty; but all the details of the contracts were fully and precisely agreed upon before the passage of the act." "The bill on which the act of congress was based was reported to the house of representatives from the committee of ways and means, and ordered to be printed, April 14, 1864; contained in its original draft the provision imposing upon woolen manufactures an additional duty; was daily under consideration, section by section, from April 19 to April 28, when it passed the house; the debates on it were printed each week in the *Congressional Globe*; and section 97, under the provisions of which this suit was brought, was offered and adopted April 27. The bill was thereafter pending in the senate until June 30, when it became a law; and, during the time the

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bill was pending, the country was in a state of war, and it was well known that the necessities of the government were very urgent."

W. G. Russell, for plaintiffs.

D. Foster & G. W. Baldwin, for defendants.

GRAY, J. The congress of the United States, in exercising the power, conferred by the constitution, "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States," and to make all necessary and proper laws for carrying this power into execution, may tax goods to be manufactured and sold, at any stage of their manufacture or sale, and may determine whether the tax upon goods sold shall be borne and paid by the seller or the buyer. The parties may by agreement decide as between themselves which shall bear the tax; but no agreement of parties, whether made before or after the passage of a tax act, can exempt property from taxation according to the laws in force when the property reaches that stage at which it is declared by those laws to be taxable. It is within the province of the legislature to determine, not only which party shall pay the amount of the tax to the government, but upon whom the burden shall finally rest, and also, for greater certainty and convenience in the collection of the tax, to provide that the amount of the tax shall be paid by one party to the government and recovered by him from the other party, or deducted upon a final settlement with him.

Examples of such legislation are to be found in the provisions inserted in the tax acts of Massachusetts from an early period, taxing real estate either to the landlord or the tenant, and giving to the one who actually pays the amount of the tax the right to recover the same, or a certain portion thereof, from the other; and in that section of the internal revenue act of the United States (the validity of which has been judicially established), requiring certain corporations to pay a duty on their bonds, and authorizing them to deduct the amount thereof in accounting with their bondholders, and thus making the corporations the agents of the government for enforcing and collecting the duty. *Derumple v. Clark*, Quincy, 38 and notes; Rev. Stats., ch. 7, §§ 7, 8; Gen. Stats.,

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ch. 11, §§ 8, 9; U. S. Stats. 1864, ch. 173, § 122; 13 U. S. Stats. at Large, 284; *Haight v. Railroad Co.*, 6 Wal. 15; *Clopton v. Philadelphia and Reading Railroad Co.*, 54 Penn. St. 356.

The English statute of 43 Geo. III, chapter 81, which imposed an additional duty on spirits distilled on and after the 5th of July, 1803, contained a section reciting that contracts for the sale or delivery of articles or commodities thus subjected to additional duties might have been made, having no reference to such additional duties; and enacting that all persons who had made any such contracts should be authorized and empowered "to add so much money as will be equivalent to the said additional duties, respectively, to the price of such articles or commodities." By a contract made six weeks before the passage of the act, a distiller agreed to supply a merchant with a certain quantity of spirits, to be shipped at Leith, at a certain price per gallon, payable in three months from the time of shipment, and also agreed to be on the lookout for a vessel, but the custom was for the purchaser to send a vessel to take the spirits on board. No vessel could be found at Leith until after the passage of the act. It was held by the house of lords, under the advice of Lords Eldon and Redesdale, that the seller was entitled to charge the purchaser with the additional duty, making the price one-third higher than that which had been agreed. *Haig v. Napier*, 1 Dow, 255. That case goes farther than is necessary to maintain this action.

By the internal revenue act of 1864, chapter 173, section 94, an *ad valorem* duty is imposed on all cloth or textile fabrics of wool, cotton or other materials; and by section 97 it is provided that "every person, firm or corporation, who shall have made any contract prior to the passage of this act, and without other provision therein for the payment of duties, imposed by law enacted subsequent thereto, upon articles to be delivered under such contract, is hereby authorized and empowered to add to the price thereof so much money as will be equivalent to the duty so subsequently imposed on said articles, and not previously paid by the vendee, and shall be entitled by virtue hereof to be paid, and to sue for and recover the same accordingly." 13 U. S. Stats. at Large, 269-273.

The duty, the amount of which the plaintiffs seek to recover in this case, is upon woolen goods, and has been paid to the government by the manufacturer of the goods, as required by the inter

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nal revenue act. The plaintiffs have themselves paid the amount of the duty on part of these goods, and appear on the facts agreed, and are not denied by the defendants to be liable to pay it on the other part to the manufacturer. The goods on which it was payable and paid have since been delivered by the plaintiffs and received by the defendants, under a contract of sale made between them before the passage of the act, and in the same shape in which the goods were when the duty was imposed and paid.

The effect of the act of congress, as applied to these facts, is, that a duty shall be imposed and paid on all goods of this description manufactured and sold after the passage of the act imposing the tax; that the time of fixing the ultimate liability of bearing the burden of the tax so paid shall be on the delivery which completes the sale and passes the property; that the person upon whom that burden shall rest shall be the buyer; that, for the convenience and security of the government, the amount of the duty shall be collected, in the first instance, from the manufacturer; and that, after it has once been so collected, the amount thereof may be recovered by him, and by any subsequent seller, from the person to whom each sells and delivers the same goods. The tax is made to fall uniformly upon the buyer in all cases; and the act imposing it applies only to sales consummated by delivery after its passage, and, therefore, is not open to the objection of being retrospective in its operation.

The duty having been imposed under the act and paid by the manufacturer, and never paid by the defendants, and the goods having been delivered by the plaintiffs to the defendants, and received by them since the passage of the act, under a contract of sale previously made between the parties, the plaintiffs have the right, by the terms of the act, to recover the amount thereof from the defendant as their immediate vendees, without regard to the question whether the plaintiffs have or have not paid it themselves.

The contract between the parties containing no other provision for the payment of the duties, the fact that, for some weeks before that contract was made, the bill, including the ninety-seventh section, was pending in congress, and published in the newspapers, has no tendency to show that the defendants should not be held liable to the plaintiffs for the amount of the duty, in accordance with that section.

There is no ground for inferring a waiver of the plaintiffs' claim.

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As soon as the act was passed, the defendants were bound to know that they were liable to the plaintiffs for the amount of these duties. If they omitted to secure re-imbursement in or under their contracts with other parties, it is their own fault; and neither their omission to do so, nor the plaintiffs' knowledge of those contracts, can affect the liability of the defendants to the plaintiffs. The plaintiffs were not required to add the amount of the tax to each invoice of goods as delivered; and they did make a formal claim upon the defendants for the amount of the duty before a final payment and settling of the accounts between the parties.

The claim of the plaintiffs is not for a penalty, but in the nature of a debt, growing out of the dealings between the parties, and the provisions of the act of congress. *Dawson v. Linton*, 5 B. & Ald. 521; *Foster v. Ley*, 2 Bing. (N. C.) 269; *Central Bridge Co. v. Abbott*, 4 Cush. 474; Met. Con. 5, 8. Congress not having prescribed in what courts the remedy therefor should be pursued, it may be sued for and recovered in any court, State or national, of appropriate jurisdiction. *Lapham v. Almy*, 13 Allen, 301; *Crocker v. Marine National Bank*, ante, 240, and authorities cited; *Stevens v. Mechanics' Savings Bank*, ante, 109.

Judgment for the plaintiffs.

PALFREY V. CITY OF BOSTON.

(101 Mass. 330.)

Revenue stamp exempt from taxation.

United States internal revenue stamps are exempt from all State and local taxation.

THIS was an action to recover the amount of a tax assessed by the defendant, for the year 1867, and paid by the plaintiff under protest. The following were the agreed facts:

"The plaintiff resides in Cambridge, and carries on, at an office hired by him for the purpose in Boston, the business of selling internal revenue stamps procured by him of the government of the United States, under the United States statutes of 1864, chapter

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173, section 161; and the sum of money sought to be recovered was assessed upon him as an assessment upon his stock in trade in said business during said year."

F. W. Palfrey, for plaintiff.

C. H. Hill, for defendant.

WELLS, J. The plaintiff is not personally subject to taxation in Boston. If he can be taxed there at all, it is only by virtue of the special authority derived from the first clause of the general statutes, chapter 11, section 12. The tax, in such case, is laid upon property; which is regarded as having its location where the business, to which it is incident, is carried on, and where the owner hires or occupies a manufactory, store, shop or wharf.

It might be questioned whether an office, occupied for the sale of internal revenue stamps, comes within the provisions of the statute. *Huckins v. Boston*, 4 Cush. 543. But the plaintiff does not take this point. He relies entirely upon the ground that he is a *quasi* officer of the government of the United States; that his business is in a measure a service rendered to that government; that the tax is a burden imposed upon that business, and thus, to that extent, an obstruction to that service.

There are two conclusive answers to this position. One is, that the plaintiff does not hold such relations to the general government, either personally or in respect to his business, as to entitle him to the exemption he claims. The case of *Melcher v. Boston*, 9 Metc. 73, is decisive of this question. The other is, that the tax is not laid upon the plaintiff, either personally or in respect to his business. It is not governed by the amount of business he may transact. It does not depend at all upon the fact whether he may make many or few sales, or none at all. The tax is upon the property in his possession and ownership, held for the purposes of business at the place where the tax is laid.

The property, which constituted the stock in trade of the plaintiff, and upon which the tax was imposed, consisted entirely of internal revenue stamps. These are instruments of the general government for the performance of its legitimate functions. They themselves represent the tax which that government levies upon the business of the community, for its own support. They are the

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drafts by which that tax is received in advance, and the vouchers by which its payment is made manifest. It is their capacity to answer these purposes which gives them value as property. They have no value otherwise. We think it clear, therefore, that, as property, they are exempt from all State and local taxation.

The defendants' counsel argues that, as the tax is upon "stock in trade," the revenue stamps are not thereby subjected to any tax directly. But we do not understand that "stock in trade" constitutes a separate subject of taxation, independent of the personal property in which it consists. The subjects of taxation are enumerated in sections 3 and 4 of the same chapter of the statutes, and section 12 relates only to the place where property so enumerated shall be held liable to taxation. The term "stock in trade" is used for convenience of description, and not as, in itself, a distinct subject of taxation. It differs essentially from the term "capital stock" when applied to corporate bodies. The decisions in regard to taxes upon corporate capital stock do not apply to this case.

The tax in this case, being laid wholly upon property exempt from such taxation, is illegal and void; and the plaintiff is entitled to recover it back.

Judgment for the plaintiff.

HECKLE V. LURVEY AND WIFE, appellants.

(101 Mass. 344.)

Husband and wife — liability of wife as purchaser of stolen property.

Where goods were stolen from a shop and sold, by the thief, to a wife, in the absence of her husband, and the wife converted them to her personal use as articles of dress, *held*, that she, as well as the husband, was liable for the goods.

ACTION in tort. MORSS, an employee in the millinery shop of Heckle, took goods of the value of \$578 therefrom, without the authority or knowledge of the owner, and sold them to Mrs. Lurvey, at her house, in Melrose, in the absence of her husband. Heckle made demand of the goods of Mrs. Lurvey and her husband, and

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then brought this action against husband and wife jointly. On the trial the above facts appeared in evidence, and Mr. Lurvey further testified as follows: "that his wife had no business of her own, and never had had any; that she acted for years as his agent in obtaining most of the provisions for his family, and paid for them with his money, and always acted as his agent in getting the wearing apparel for herself and their daughter; that all of those goods charged in the writ which came into her possession she got by his order and direction; and that she obtained them for wearing apparel for herself and their daughter."

The judge gave the following instruction: "That this action might be maintained against the female defendant for the value of the articles in question, if they were stolen by Morss from the plaintiff, and were delivered to the possession of the female defendant, the husband not being present, and were demanded of her and her husband before the writ was served, and in the absence of any proof that they had passed out of the possession and control of the wife at the time of the demand, even if the husband ordered the wife to obtain them as wearing apparel for herself and daughter, and the articles were wearing apparel." Verdict for plaintiff, and Mrs. Lurvey appealed.

L. W. Osgood, for Mrs. Lurvey.

N. B. Bryant & J. B. Lord, for plaintiff.

CHAPMAN, C. J. 1. The principle is well settled, that, when a thief sells chattels, even to an honest purchaser, no title passes, and the owner may maintain an action for the property without a previous demand. *Dame v. Baldwin*, 8 Mass. 518; *Stanley v. Gaylord*, 1 Cush. 536; *Riley v. Boston Water Power Co.*, 11 id. 11; *Chapman v. Cole*, 12 Gray, 141; *Gilmore v. Newton*, 9 Allen, 171.

2. There is no legal presumption that acts done by a wife in her husband's absence are done under his coercion or control. Indeed, if she, in his absence, does a criminal act, even by his order or procurement, her coverture will be no defense. *Commonwealth v. Butler*, 1 Allen, 4; *Commonwealth v. Feeney*, 13 id. 560.

3. For her torts and trespasses during coverture the action must at common law be joint against them both. Bac. Abr., "Baron and Feme, L." An action of trover may be maintained against them

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jointly for the conversion of goods. *Draper v. Fulkes*, Yelv. 166, and Am. notes; *Keyworth v. Hill*, 3 B. & Ald. 685.

These principles are decisive of the present case. The goods were stolen by Morris from the plaintiff, and sold to the wife in the absence of the husband. She converted them to her personal use as articles of dress, and a demand by the plaintiff was unnecessary.

The instruction excepted to applying only to the liability of the wife, and no question being made as to the liability of the husband, we have no occasion to discuss the operation of our recent statutes upon a case of this character.

Exceptions overruled.

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(101 Mass. 303.)

Contracts made on the Lord's day.

A. and B. made a trade on the Lord's day, whereby A. sold B. a set of jewelry and B. gave in exchange a coat. A few days after B. returned the jewelry and demanded the coat, and, on refusal, brought action to recover its value. *Held*, that the transaction being on the Lord's day was illegal and that the plaintiff could not recover.

THE following were the agreed facts:

"The plaintiff and the defendant, on the Lord's day, made a trade, whereby the plaintiff sold the defendant a set of jewelry, and the plaintiff sold the defendant a coat of the value of \$23, which the defendant received in part exchange for the jewelry. A few days afterward, the plaintiff, declining to keep the jewelry, returned it to the defendant. Afterward the plaintiff requested the defendant to pay him the price of the coat, but the defendant refused so to do, alleging that he would lose more than the price of the coat by reason of the plaintiff's refusal to keep the jewelry. Thereupon the plaintiff brought an action for the price of the coat, which the defendant successfully defended on the ground of the illegality of the contract. The plaintiff then made a demand upon the defendant for the coat, which was still in the defendant's possession; but the defendant refused to return it, and now retains it. And upon such refusal this action is brought by the plaintiff to recover the value of the coat."

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F. W. Kittredge, for plaintiff.

H. W. Bragg, for defendant.

WELLS, J. That contracts made upon the Lord's day are illegal; that no action based upon such a contract can be maintained in a court of law or equity, either to enforce its obligations or to secure its fruits, in favor of either party, are propositions settled beyond controversy. But such contracts are not altogether inoperative. They may be executed by the parties, and then the same principle of public policy which leads courts to refuse to act, when called upon to enforce them, will prevent the court from acting to relieve either party from the consequences of the illegal transaction. This may indirectly give effect to the executed illegal contract. The purpose of the rule of law, however, is not to give validity to the transaction, but to deprive the parties of all right to have either enforcement of or relief from their illegal contracts. In such cases, the defense of illegality prevails, not as a protection to the defendant, but as a disability in the plaintiff.

Upon this principle, possession, acquired from an illegal transaction, or by a contract fully executed, will often avail the party holding it, as a sufficient title. Neither party is allowed to impeach its validity by asserting the illegality of his own act. The transaction takes effect from the disability of the parties to assert any right to the contrary. The court does not give it effect, but simply refuses its aid to undo what the parties have already done. *Chitty on Cont.* (10th Am. ed.) 732; *Johnson v. Willis*, 7 Gray, 164; *King v. Green*, 6 Allen, 139; *Worcester v. Eaton*, 11 Mass. 368.

The plaintiff relies upon certain intimations in the opinion by which the decision of the court was announced in the case of *Ladd v. Rogers*, 11 Allen, 209. The contract was there held to be illegal, so that no action could be maintained for the price of a horse sold and delivered upon the Lord's day. It was also held that no implied assumpsit for the value of the horse arose from the fact that the defendant afterward retained and treated the horse as his own. This last point was decided upon the general principles applicable to assumpsit, and not on any ground of taint from the original illegality. The opinion also strongly intimates that the sale was wholly nugatory, passed no property and gave no rights; and that the plaintiff might have maintained trover for the conversion of the horse, notwithstanding the sale and delivery.

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The case of *Williams v. Paul*, 6 Bing. 653, arose upon a similar state of facts, with the addition of a subsequent promise to pay. The court held that the value of the property — not the price agreed for on Sunday — might be recovered upon *quantum meruit*.

There are other authorities to the effect that, where there has been only a partial execution of an illegal contract, the party who has advanced money or delivered property under it may reclaim and recover it. This is sometimes put upon the ground that it is better to encourage the revocation than the fulfillment of such contracts; sometimes upon the ground of a difference in the position of the parties in respect to the illegality of the transaction, or of some advantage taken or fraud committed by one upon the other. Upon this latter ground, the case of *Adams v. Gay*, 19 Vt. 358, appears to have been placed. In that case there had been an exchange of horses on Sunday. The whole transaction was completed on that day. One of the parties, being cheated in the trade, undertook to revoke, and was allowed to recover, not on the ground that the whole transaction was void and inoperative, but on the ground of fraud in the other party, and as an exception to the general rule. The judgment did not rest upon that ground; but the doctrine, substantially as above stated, was announced by the court as the reason for refusing to allow the defendant, after argument upon exceptions, an opportunity to set up the defense of illegality under the statute of another State. Upon the point stated in *Adams v. Gay* that an action lies for fraud in a contract void for illegality, the decisions in Massachusetts are clearly to the contrary. *Robeson v. French*, 12 Metc. 24; *Way v. Foster*, 1 Allen, 408; *Gregg v. Wyman*, 4 Cush. 322.

It is a question undoubtedly to be determined by the court upon considerations of public policy. But those considerations must be general, and not such merely as arise out of the facts of the particular case. Where the payment or delivery is made for the furtherance of an immoral or illegal purpose, the court will not help the guilty party to revoke, although another, equally guilty, may thereby make an undeserved gain. But, where the illegality consists in the time or mode in which the transaction takes place, and not in the character of the transaction itself, the court will undoubtedly regard the position of the parties in respect to the subject-matter. Thus, in the case of a horse delivered in pursuance of an illegal contract of hire on the Lord's day, although the owner cannot recover upon L^{aw}

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contract, and can have no remedy for excessive use or injury to his horse while in the possession of the hirer, yet he is not deprived of his title to the horse, and he may at any time retake possession and thus be restored to all his rights. The fact of an illegal bailment or delivery, without any purpose to pass the title, will not enable the party receiving the property to convert it to his own use, or withhold it from the owner, without any legal liability therefor. *Dwight v. Brewster*, 1 Pick. 50, 55.

In case of a contract of sale not executed by payment of the consideration, when the contract remains executory on one side, the law which declares the executory part of the contract void might well regard the partial execution ineffectual. It is not necessary, however, to decide the point, inasmuch as in the present case the contract was completely executed on both sides, the parties are *in pari delicto*, and, by refusing to aid either party in the attempt to restore himself to his former position, we leave him in the condition in which he has placed himself by his own illegal conduct. That, as we understand it, is the aim of the courts in applying the general rule upon this subject.

The plaintiff contends that the rule does not apply, because he does not seek to enforce any rights which depend at all upon the illegal transaction; that both the legal title which he asserts, and the proof by which he maintains that title, not only omit to disclose, but utterly disregard the unlawful sale; whereas it is the defendant who is obliged to set up the illegal conduct of himself and the plaintiff alike, in order to justify his retention of the plaintiff's property. But the illegality lies directly in the course of events which placed the property in the hands of the defendant, and made it necessary for the plaintiff to resort to this suit to regain it. It is inseparably connected with the origin of the cause of action, and it is immaterial which party discloses it to the court. *Gregg v. Wyman*, 4 Cush. 322; *Duffy v. Gorman*, 10 id. 45. The ends of justice are found to be best secured by permitting it to be thus administered upon one of two offending parties at the instigation of the other.

The decision of the superior court is accordingly affirmed.

Judgment for the defendant.

NOTE.— At common law, with the exception of being "*dies Dominicus non est iudicatus*," Sunday differed from no other day of the week, and all business transactions on that day was valid. *Rex v. Brotherton*, Stra. 709; *Mackall's Case* 9 Rep. 68 b; Cro. Jac. 280, *Watte v. The Hundred of Stoke*, id. 496; *Drury v. Defontaine*, 1 Taunt. 131; *Merritt v. Earle*, 81 Barb. 41. But no judicial act could be done. *Swan v. Broome*, 1 W.

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Bl. 496, 526; *Baxter v. People*, 8 Gilm. 668; *True v. Plumley*, 36 Me. 406. For a very elaborate discussion of the limitation on judicial action on Sunday, see *Hüller v. English*, 4 Strobb. 486. In *Story v. Elliot*, 8 Cow. 27, an award made on Sunday was held void, being a judicial act.

Most of the States have statutes regulating the subject of work on Sunday, embodying, some literally and others virtually, the language of the statute of 29 Car. 2, chapter 7, section 1, which reads as follows: "No tradesman, artificer, workman, laborer or other person whatsoever, shall do or exercise any worldly labor, business or work of their ordinary calling upon the Lord's day, or any part thereof, works of necessity and charity only excepted." Under this statute it was decided that a sale of goods on Sunday, which was not in the ordinary calling of the vendor, was valid, and the price could be recovered. *Drury v. Defontaine*, 1 Taunt. 181. In *Fennell v. Ridler*, 5 B. & C. 406, the sale of a horse on Sunday was held void and the warranty inoperative. See, also, *Rez v. Inhabitants of Whitnash*, 7 B. & C. 506; *Scarf v. Morgan*, 4 M. & W. 270; *Walton v. Gavin*, 16 Q. B. 48; *Begbie v. Levi*, 1 Crompt. & J. 180, in each of which it was held that the statute only prohibited labor, business or work done in the course of a man's ordinary calling. Contracts executed on Sunday have been held void in the following cases: *Hilton v. Houghton*, 35 Me. 143; *Hill v. Sherwood*, 3 Wis. 343; *Twiss v. Larrabee*, 26 Me. 484; *State v. Lupur*, 33 id. 530; *Nason v. Dinsmore*, 34 id. 301; *Lyon v. Strong*, 6 Vt. 219; *Lovejoy v. Whipple*, 18 id. 379; *Adams v. Gay*, 19 id. 358; *State Bank v. Thompson*, 42 N. H. 800; *Allen v. Deming*, 14 id. 133; *Kepner v. Keefer*, 6 Watts, 231. A different rule was laid down in Massachusetts in the case of *Geer v. Putnam*, 10 Mass. 312, but that case has been overruled since. *Pattee v. Greeley*, 13 Metc. 284, wherein a bond, executed on Sunday, was held illegal. The same was also held in *Fox v. Mensch*, 3 Watts & Serg. 444. In Massachusetts, a will executed on Sunday is valid. *Bennett v. Brooks*, 9 Allen, 118. A sale or trade of horses on Sunday is illegal, and no action will lie on the warranty or for deceit. *Lyon v. Strong*, 6 Vt. 219; *Robeson v. French*, 13 Metc. 24; *Murphy v. Simpson*, 14 B. Mon. 419; *Northrup v. Foot*, 14 Wend. 248; *O'Donnel v. Sweeney*, 5 Ala. 467; *Adams v. Hamill*, 2 Doug. 73; but see *Adams v. Gray*, 19 Vt. 358, and *Müller v. Roessler*, 4 E. D. Smith, 234. A clerk in an attorney's office was not allowed to recover of his principal for extra services performed on Sunday. *Watts v. VanNess*, 1 Hill 76. The Massachusetts courts, while holding notes made and delivered on Sunday to be invalid, also hold that a note dated on Sunday, but made and delivered on a secular day, is binding. *Stacy v. Kemp*, 97 Mass. 166.

In New York a contract for the publication of an advertisement in a Sunday newspaper was held void. *Smith v. Wilcox*, 19 Barb. 581; 24 N. Y. 353. But such contracts were legalized by the legislature in 1871. In this State, private contracts, as a private sale of chattels, are held valid. *Boynton v. Page*, 13 Wend. 425; *Müller v. Roessler*, 4 E. D. Smith, 234; *Greenburg v. Williams*, 9 Abb. 206. So a compromise of a suit on Sunday is good. *Shank v. Shoemaker*, 18 N. Y. 480; *Morris v. Crane*, 4 Ch. Sent 6. In *Merritt v. Earle*, 31 Barb. 38, a contract for transportation of property made, and the property delivered on Sunday, was held valid. A contract for the hire of a horse and carriage, made with the knowledge that they were to be used for illegal traveling on Sunday, is bad, and the owner cannot recover thereon, though he can for injury to the property. *Nedine v. Doherty*, 46 Barb. 59.

The subsequent ratification of a contract made on Sunday renders it valid. *Sargeant v. Butts*, 21 Vt. 90; *Sumner v. Jones*, 24 id. 317; *Johnson v. Willis*, 7 Gray, 164.—BKP

Savannah National Bank v. Haskins.

SAVANNAH NATIONAL BANK V. HASKINS *et al.*, appellants.

(101 Mass. 370.)

Enforcing payment of lost bill.

A bank discounted a draft on the faith of a letter of credit from the drawee, and the draft was unavoidably lost in the course of transmission to the special indorsee of the bank. *Held*, that the bank could recover of the drawee in equity, on offering indemnity against the draft.

BILL in equity to recover for a lost draft from the drawee. The plaintiffs discounted several drafts drawn on the defendants by James T. Paterson, on the faith of a letter of credit from defendants, dated February 6, 1868, "whereby the defendants agreed to honor drafts drawn on them by James T. Paterson, at that time of Savannah, to the amount of \$5,000 per month, at sight or on time." The plaintiffs, after discounting two of the drafts, dated respectively April 9 and April 28 (the first at sight, the second at thirty days), indorsed them specially to the Fourth National Bank of New York and mailed them to the indorsees; but they never reached their destination, having been lost, stolen or destroyed in the course of transmission. Paterson, the drawer, died May 16, 1868, and afterward (May 22) the plaintiff obtained of Roher, the attorney of Paterson during his life-time, duplicates of the lost drafts, and sent them to the Fourth National Bank of New York, by whom they were sent to a bank in Boston, and by the latter presented for payment, which was refused by the defendants. The plaintiffs offered, in the bill, such indemnity as the court might prescribe against the drafts. On a demurrer by the defendants, for want of equity, AMES, J., reserved the case.

H. C. Hutchins, for defendants:

1. Defendants' letter of credit did not amount to an acceptance of these drafts. 1 Pars. on Notes and Bills, 296; *Banorgess v. Hovey*, 5 Mass. 11; *Storer v. Logan*, 9 id. 55; *Carnegie v. Morrison*, 2 Metc. 381; *Coolidge v. Payson*, 2 Wheat. 75; *Boyce v. Edwards*, 4 Pet. 111, and others.

2. The defendants are only liable for drafts actually presented in the original form. Story on Bills, 448; *Tuttle v. Standish*, 4 Allen, 481; *Hansard v. Robinson*, 7 B. & C. 90.

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The loss of the drafts was the plaintiffs' misfortune, and they ought not to be allowed to impose unnecessary burdens and obligations on the defendants with reference to the drawer and his estate.

3. The remedy of the plaintiffs is at law—not in equity. It is not a case for giving or requiring indemnity, because the drafts were specially indorsed, and the defendants are not liable upon lost drafts.

F. E. Parker, for plaintiffs.

COLT, J. The plaintiffs seek to enforce payment of certain drafts, drawn by Paterson upon the defendants, which, by their letter of credit containing an express promise to the plaintiffs, the defendants were bound on presentment to accept and pay. The drafts were discounted by the plaintiffs, sent on by mail for acceptance, and lost in course of transmission without fault of the plaintiffs. The death of the drawer made it impossible to procure duplicates. The bill offers indemnity such as the court may order, and an affidavit of loss is annexed.

Considering the defendants' letter of credit as a promise to accept and pay, made upon the commercial condition of presentment and surrender of the drafts, a case is stated, where, without fault, the plaintiffs have been deprived of the power to comply with the condition. And a majority of the court are of opinion that it comes within that relief which courts of equity administer in cases where recovery at law is precluded by reason of the loss of a written instrument, to the possession of which the defendant is, by the terms of his contract, entitled upon the performance of his promise.

This jurisdiction in equity is most commonly referred to the head of accident. And an accident, when arising in relation to contracts, has been defined, in the sense used in a court of equity, to be an occurrence which was not anticipated by the parties when the contract was entered into, and which gives an undue advantage to one of them over the other in a court of law. 1 Story's Eq., §§ 79, note, 86, 87; *Hansard v. Robinson*, 7 B. & C. 90; *East India Co. v. Boddum*, 9 Ves. 468; Adams' Eq. 166.

The contract of an acceptor of a bill of exchange is, that he will pay upon presentment of the identical bill. He has the right to insist upon the condition. And yet the power of a court of equity to compel payment without it, upon suitable indemnity, is well

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recognized in England. In *Davies v. Dodd*, 4 Price, 176, a remedy was afforded against an accommodation acceptor of a lost bill, to compel payment, and it was said that the plaintiff's equity was founded in the want of power in courts of law to regulate the security to be given to the defendant against the forthcoming bill. *McCartrey v. Graham*, 2 Sim. 286, was a bill to enforce payment of the defendant's acceptance, brought by the last of several indorsers. It contained an offer of indemnity against the draft, which was stolen from the mail coach in the course of its transmission. The demurrer, which was for want of equity and want of parties, was overruled; the vice-chancellor remarking that the objection for want of parties would not avail, because the acceptor, being primarily liable, by paying the bill discharges the other parties from all liability. In *Hansard v. Robinson*, *ubi supra*, Lord TENTERDEN declared that the plaintiff, though he could not prevail in law against the acceptor of a lost bill, was not without remedy, for he could enforce payment in equity. *Davis v. Dodd*, 4 Taunt. 602; 2 Pars. on Notes and Bills, 297, note; Story on Bills, § 447.

In the case at bar, assuming that the defendants' letter of credit is not, under the decisions, to be regarded as an acceptance, yet it was a contract with the plaintiffs subject to precisely similar conditions, upon the strength of which the bank discounted the draft in question. It comes fairly within the principle upon which relief is afforded, and cannot in this respect be distinguished from an actual acceptance. *Carnegie v. Morrison*, 2 Metc. 381. If the defendant is reasonably indemnified from harm, he has no reason in either case to refuse payment.

The demurrer in this case cannot be sustained on the ground that there is adequate relief at law. Under the earlier decisions of this court, and before full equity powers were conferred, it was held that a recovery at law might be had upon a lost note, the plaintiff giving a bond of indemnity. It is not clear, even under the pressure created by the sense of injustice which would ensue to the plaintiff if left without remedy in such cases, that the court intended to decide that a recovery could be had in all cases against an indorser or acceptor upon giving a simple bond of indemnity. There is now full equity jurisdiction; and, since the late case of *Tuttle v. Standish*, 4 Allen, 482, in which this whole subject is thoroughly reviewed, it can no longer be contended that a recovery at law can be had against an acceptor or indorser, upon a simple bond protecting the

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defendant from being called on to pay a second time to a *bona fide* holder. The acceptor of a bill of exchange not only has a right to such protection, but he has a right to have the bill surrendered to him on its payment, to be used as a voucher in his settlement with the drawer.

The remedy afforded by a court of equity in such cases is appropriate and complete. Without embarrassment from the technical rules which control the administration of courts of law, it adapts its decrees and process to the circumstances of each case as it arises. In all cases where, by the accidental loss of the note or bill, the plaintiff cannot comply with the defendant's right under his contract to have the identical instrument surrendered, and it is within the power of the court to secure the defendant from all appreciable injury, relief will be decreed to the plaintiff in equity, upon terms and conditions which will secure and protect the rights of all. And it can make no difference in principle whether the defendant's contract is an acceptance or only a promise to accept.

It is urged in support of the demurrer, that it is not in the power of the court so to frame its decree as to leave the defendants, after payment, in as good condition with respect to their claim upon the drawer as if placed in possession of the drafts; that the burden of establishing the claim upon a third party without vouchers cannot be imposed upon them as a result of the misfortune of the plaintiffs. In reply to this, it is sufficient that, in the present stage of the case, it does not appear that all the defendants' rights may not be fully secured. That will depend upon future developments. It may be shown at the hearing, that the defendants were at the time, or have since been, placed in funds by the drawer to meet these drafts. The plaintiffs may produce a release from the drawer, or his present legal representatives, dispensing with the production of them as vouchers in settlement with the estate. Or it may in some other way be made to appear that a bond of indemnity with the usual condition, and the further provision that no cost, expense or damage shall be suffered by the defendants in their relation to the drawer or his estate by reason of the payment of the drafts, will be found amply to preserve all their rights. The nature of the security to be required can only be determined upon a hearing on the merits.

It is further contended that, if the plaintiffs have any remedy, it is complete at law, because the drafts were specially indorsed. If the fact were as urged, it would, for the reasons above stated, seem

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to be no ground for excluding equity jurisdiction. But, as we understand the facts, the drafts were originally indorsed in blank, and were only restricted by the plaintiffs' indorsement. This does not prevent them from passing by delivery, because any holder may fill up the blank indorsement directly to himself. *Smith v. Clarke, Peake, 225.*

Demurrer overruled.

AMERICAN RAILWAY FROG CO. v. HAVEN AND OTHERS.

(101 Mass. 393.)

Corporation — voting on stock held in trust — mandamus.

Some of the stockholders of a manufacturing company transferred 400 shares to C., to be held by him "for the benefit of the corporation;" and, at an election of officers, C. voted on these 400 shares, whereupon the election was claimed by the persons having the highest number of votes. *Held*, that a mandamus would issue to compel the surrender of the offices to the persons having the highest number of votes, after excluding the 400.

PETITION for a writ of mandamus. The case settles the rights of rival claimants to the offices of the American Railway Frog Co. The facts are found in the report of WELLS, J., which is as follows:

"This was a petition brought in the name of the American Railway Frog Company (a corporation duly organized under the laws of this commonwealth), and signed 'American Railway Frog Co., by D. N. Pickering, President,' praying this court to issue its writ of mandamus, declaring Otto Cuntz to have been duly elected clerk of said corporation and of its board of directors, Charles S. Lincoln, Daniel N. Pickering, Alonzo Bridges, Otto Cuntz, Isaac M. Cate, James Power and Edward G. Allen, duly elected directors, and Isaac M. Cate, treasurer, and commanding George H. Hood and Aaron N. Clark to deliver to Cuntz, clerk as aforesaid, and to Cate, treasurer as aforesaid, all the books and papers of the corporation, respectively held by said Hood and Clark.

"A rule was granted to show cause why mandamus should not issue. And an answer was put in, signed by John A. Haven, Moses M. Rounds, Aaron N. Clark and George H. Hood, in which they

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denied that the matters set forth in the petition were sufficient, in law, to entitle the parties thereto to have or maintain a writ of mandamus; denied, also, that Pickering was president of the corporation, and authorized to present the petition in its behalf; alleged that 400 shares, mentioned in the petition as belonging to the corporation, and as held by Clark for its benefit, and upon which, therefore, the petition claimed that the corporation had no right to vote, belonged to Clark, and that he had full right to represent and vote upon them; admitted that Cuntz and Cate demanded from Hood and Clark the books and papers of the corporation, but alleged that Hood and Clark held them as officers of the corporation; and also alleged that the corporation was a private corporation, established for pecuniary gain, and not charged with duties of a public nature, or affecting the public interest; and that, for the above reasons, the prayer of the petition should not be granted.

“At the hearing (it having been agreed that the same effect should be given to said hearing as if it was upon a writ issued in the alternative) it appeared that this corporation was organized in 1866, for the purpose of manufacturing and selling railway-frogs, but it did not appear that it had done any business in manufacturing or selling; that the whole number of shares into which the capital stock was divided was 2,000; that said shares were issued to various parties, and among others to Aaron N. Clark (and it was not disputed that all the stock had been properly issued to the original stockholders); that 400 shares were afterward transferred by different stockholders, from shares held by them, to Aaron N. Clark, to hold for the benefit of the corporation; that the stock journal and stock ledger showed that some of these shares were transferred from Aaron N. Clark to Aaron N. Clark, treasurer, and all of them were, by said journal and ledger, charged to Clark as treasurer of the corporation; that by the by-laws the affairs of the corporation were to be managed by a board of directors, consisting of seven persons, to be chosen at the annual meeting; that one of them was to be chosen by said board president of the corporation; that the by-laws did not provide or determine what number or interest should constitute a quorum at a stockholders' meeting; that a clerk and a treasurer of the corporation were also to be chosen at said annual meeting; that, at the annual meeting held in November, 1867, Daniel N. Pickering, John A. Haven, Moses M. Rounds, Aaron N. Clark, George H. Hood, Alonzo Bridges, and Edward G.

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Allen were chosen directors, George H. Hood clerk, and Aaron N. Clark treasurer thereof; that, at the annual meeting held November 5, 1868, it was unanimously voted to proceed to the election of a clerk for the ensuing year by a stock vote, Clark voting on said shares without objection; that thereupon a stock vote was taken for clerk, and the number of shares voted on were 1933, including the 400 above mentioned, held by Clark; that of these 1933 Otto Cuntz had 868, and George H. Hood had 1065, including in said last number the said 400 shares; that, a discussion having risen as to the legal right of Clark to vote on said 400 shares, Clark was authorized by a majority of the board of directors to vote upon them; that the meeting was subsequently adjourned to meet on November 12, when a committee, appointed to investigate the legal points relating to Clark's right to vote, were to report; that, at the adjourned meeting, Clark, who had been in the mean time authorized by the board to represent said shares, made a motion to adjourn to the first Wednesday of November, 1869, the committee having reported that they could not agree; that, a stock vote having been called for, 1988 shares were voted on, of which 928 were in the negative, and 1060, including said 400 held by Clark, were in the affirmative and in favor of adjournment; that the presiding officer then declared the meeting adjourned, and left the chair; that certain stockholders, holding a majority of the shares in the corporation exclusive of the said 400, being of opinion that said vote was in the negative, remained and made choice of a presiding officer; that, it being claimed by them that Cuntz had been declared elected clerk at the previous meeting, he was then duly sworn (but it was denied by the defendants that he was so declared to be elected); that said stockholders proceeded to elect a board of directors, and, upon a stock vote being taken, 868 shares were voted on, and Charles S. Lincoln, Daniel N. Pickering, Alonzo Bridges, Otto Cuntz, Isaac M. Cate, James Power and Edward G. Allen were chosen directors, and Isaac M. Cate treasurer, each receiving in his favor a majority of all the shares in the corporation, excluding said 400 shares; that said meeting was then adjourned, and a meeting of the persons last above named, claiming to be the board of directors for the then ensuing year, was held, at which meeting Pickering was elected president of the corporation, and Cuntz clerk of the board of directors; that Cuntz and Cate, by order of the said persons thus chosen as the board of directors, made a written demand

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upon Hood and Clark, respectively, for those books and papers of the corporation, of which the clerk of the corporation and the clerk of the board of directors and the treasurer were proper custodians; and that a vote was passed at a meeting of said persons, thus claiming to act as the board of directors, authorizing the president elected by them to employ counsel and take all proper steps to obtain legal possession thereof.

“It also appeared that the parties thus claiming to be the newly elected board of directors filed a bill in equity against Haven, Rounds, Clark, Hood and Bridges, for a writ of injunction to restrain them from selling any property of the corporation, and more particularly from selling and transferring said 400 shares, or any of them, and from acting, or pretending to act, as directors and clerk and treasurer, and that they might be ordered to restore all the books and papers of the corporation to those of the petitioners who constituted the newly elected board of directors, and for general relief.

“Upon the foregoing facts it is reserved for the full court to decide whether a peremptory mandamus should issue, in whole or in part, as prayed for, or the petition be dismissed.”

C. A. Welch, for petitioners.

A. Churchill, for respondents.

AMES, J. This petition raises three questions: 1st. Were Otto Cuntz and the five others, whose names are joined with his, duly elected at the annual meeting of the company to the offices which are claimed for them respectively? 2d. If they were so elected, will mandamus lie for the purpose of compelling these respondents, who claim the same offices, to give up the books and papers of the company in their possession? 3d. If mandamus will lie, are the circumstances of the case of such a character that the court, in the exercise of a sound judicial discretion, ought to direct the issue of that writ?

The case finds that the capital stock was divided into 2,000 shares, all of which were properly issued to the original stockholders; and that sometime afterward 400 of these shares were transferred by some of the stockholders to Aaron N. Clark “to hold for the benefit of the corporation.” If these transfers had

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been made directly to the corporation, without the intervention of a trustee, it would hardly be contended that it would thereby become entitled to vote at a meeting of stockholders. A corporation cannot literally be one of its own stockholders in the full sense of that term. Such a transfer might not operate as a mere surrender or cancellation of stock, unless so intended. It would not diminish the amount of the capital, nor necessarily reduce the number of shares. The corporation might perhaps receive such a transfer, and hold the stock so conveyed to it, for the purpose of re-issue to new subscribers or purchasers. By the terms of the transfer, Clark holds "for the benefit of the corporation," and of course subject to its order. This is the extent of his trust. Nothing in the nature of it makes it necessary that he should vote, as the holder of those shares. There is no apparent reason why he, not being beneficially or practically the owner of them, should be endowed with the privilege of controlling 400 votes according to his own judgment or pleasure, especially when it is taken into consideration that the corporation for which he holds them has no right of voting in any event. It is easy to see that any such privilege would not only be unreasonable and unfair, but might lead to great abuses. The position of these shares, in our judgment, is the same, to all intents and purposes, so far as the right of voting upon them is concerned, as if they were held directly by the corporation itself; and, until they are sold and transferred by its authority, the right of voting upon them is suspended. *Ex parte Holmes*, 5 Cow. 426; *Ex parte Willcocks*, 7 id. 402. It follows, then, that, at the annual meeting in question, the votes on these 400 shares ought not to have been received or counted; that the whole number of competent and legal votes was 1533, and no more; that Cuntz and his five associates received a clear majority of these votes; and that they were duly elected to the offices claimed for them respectively in the petition.

We then come to the second question, namely: Whether this is one of the cases in which the court has the power to issue the writ of peremptory mandamus. We must consider this petition as the petition of the corporation. The respondents are not its officers, but are mere intruders and wrong-doers, their term of office having expired. In the case of a public office or corporation, it is not denied that this writ might issue if the petitioner's title were first made out. It is well settled that it can be granted, for instance, to

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compel a town clerk, or a clerk of a public corporation, whose office has expired, to deliver over to his successor the common seal, books, papers and records of the corporation, which had belonged to his custody. Some of the cases go so far as to say, that "indeed it lies to any person who happens to have the books of a corporation in his possession and refuses to deliver them up. In fact it is the peculiar and appropriate remedy in such a case." *Rex v. Wildman*, 2 Stra. 879; 2 Kyd on Corp. 301; Angell & Ames on Corp. (6th ed.) § 707, and cases cited. *St. Luke's Church v. Slack*, 7 Cush. 226. It is described by Lord MANSFIELD as a very beneficial writ, which may be issued by the court where there is no other specific remedy. *The King v. Commissioners of Land Tax*, 1 T. R. 148. It will not be granted where the applicant has another adequate, specific legal remedy. *Rex v. Barker*, 3 Burr. 1267; *The King v. Bishop of Chester*, 1 Term R. 404; 2 Kyd on Corp 297; *In re White River Bank*, 23 Vt. 478. But the remedy, in order to be a bar to the issuing of the writ, must not only be adequate but also specific; and damages recoverable for the violation of the right are not such specific remedy. In the case at bar, it is difficult to see in what way the petitioners can obtain such adequate and specific relief, if their petition should be refused. The same 400 illegal votes that have created the difficulty may perhaps be employed to render it permanent.

The respondents insist, however, that, inasmuch as they are actually in possession of the offices in question, under a claim of right, and exercising the functions annexed to them, the only mode of controverting their title is by a writ of *quo warranto*. The fact that the offices are *de facto* filled and occupied by rival claimants is by no means decisive, and perhaps not very material, upon this point. *Borough of Bossing*, 2 Stra. 1003; *Borough of Aberystwith*, id. 1157; *Corporation of Scarborough*, id. 1180; *The King v. Bedford Level Co.*, 6 East, 356. It has been so decided in the case of conflicting claims to the office of county commissioner. *Strong, petitioner*, 20 Pick. 484. Also in the case of members of a school committee. *Conlin v. Aldrich*, 98 Mass. 557. It may be, that, if a petition for mandamus were literally in the name and for the benefit of a claimant of an office against an actual incumbent, the parties would be left to a *quo warranto*; but however that may be, the case of *St. Luke's Church v. Slack*, 7 Cush. 226, seems decisive upon the point that, in the case of a public corporation, a mandamus

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may issue on its petition against persons claiming to hold its offices.

Upon the third of the questions raised by the case at bar, it is claimed that, as the writ of mandamus is not a writ of right, but is only to be granted at the discretion of the court, in view of all the circumstances, the present is not a proper case for the exercise of that discretion. The respondents insist that, even upon the assumption that the object of the petition is to compel them to do what they are bound in duty to do, and what the petitioners have a clear and manifest right to have done, and upon the assumption also that the petitioners have no adequate specific remedy except what the writ would give them, yet the writ is only to be issued for public purposes, and to compel the performance of public duties, and for that reason ought not to be granted on the present occasion. This objection is the only one that has given us any considerable embarrassment. It is insisted that this company, although called a corporation, differs very little from a mere copartnership; that it is in fact a mere association for trading purposes; that it is not concerned with any public charity, or trust, or institution, or any public interest of any kind, and that its affairs are not matters of public concern in such a sense as to justify the exercise by the court of any extraordinary power.

The writ is defined, by the earlier writers, as a high prerogative writ, flowing from the king himself sitting in the court of king's bench, superintending the police and preserving the peace of the country; and it is also called one of the flowers of that court—a definition which throws very little light upon the question as to the occasions that will require or justify its issue. The old rule undoubtedly was, that it was only to be issued in cases of public interest or having some relation to public offices or rights; but in the time of Lord MANSFIELD a more liberal doctrine was established, and the writ was used more freely. On a review of the authorities, it seems substantially certain that it is by no means confined to cases of a public nature, or to public corporations. It has often been issued in cases where the corporation partook very slightly, if at all, of a public character, and where the question in controversy was rather upon some matter of private right. *Schriren's Case*, 2 Stra. 832; *Rex v. Wildman*, id. 879. Thus, to compel the swearing in of a director in the Amicable Assurance Company, a company chartered by the crown (*Anonymous*, 2 id. 696); to compel a trading

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company to admit a member (*Dacosta v. Russia Co.*, id. 783); to compel a company to admit a Quaker on his affirmation, he refusing to be sworn. *Rex v. Turkey Co.*, 2 Burr. 999. See also *White's Case*, 2 Ld. Raym. 1004; 2 Kyd. on Corp. 299. The more recent English cases on the subject are of the same general tendency, and some of them perhaps depart rather more widely from the ancient rule than any of the decisions of the American courts. For instance, it has been granted to compel the master of a corporation to affix the seal to an instrument legally executed by the majority (*The Queen v. Kendall*, 1 Q. B. 366); to compel a company to enter upon its books the probate and will of a shareholder (*The King v. Worcester & Birmingham Canal Co.*, 1 Man. & Ryl. 529); to compel a joint-stock company to pay the amount of an award against them (*The King v. St. Katharine Dock Co.*, 4 B. & Ad. 360); to compel one manager of a charity to deliver to another one key of a coffer, where each is authorized to have one (and it was held to be no objection to the rule, that it was a private charity). *The Queen v. Abrahams*, 4 Q. B. 157.

In our own country the writ has been issued in the case of corporations and claims, some of which, at least, might more properly be called private than public, namely, to restore bank directors who had been refused the exercise of their rights as directors by a majority of the board (*Prieur v. Commercial Bank*, 7 La. 509); to restore a member of a navigation company who had been improperly disfranchised (*Delacy v. Neuse River Navigation Co.*, 1 Hawks, 274); to maintain the right of a bank director to see the discount book, although his associates, from a belief that he was unfriendly to the interests of the corporation, had by a resolution directed the cashier to refuse to show it to him (*People v. Throop*, 12 Wend. 183); to restore a trustee of a private academic corporation, though no emoluments were attached to the office (*Fuller v. Plainfield Academic School*, 6 Conn. 532); to restore members of private corporations for charitable purposes, illegally expelled. *Commonwealth v. German Society*, 15 Penn. St. 251. In the case of *Barrows v. Massachusetts Medical Society*, 12 Cush. 402, this court refused to grant the writ to compel the restoration of a member who had been expelled, on the ground that it did not appear that he had been wrongfully expelled.

In a matter depending upon a sound judicial discretion, it is difficult and perhaps impossible, from the nature of the case, to lay

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down in advance a precise and inflexible rule to govern the exercise of that discretion. Some of the text-books go so far as to say that the writ is never issued except in the case of public persons or officers, or to compel the performance of public duties. Tapp. on Mand. 12. They all, however, agree in adopting Lord MANSFIELD's rule, that the value of the matter and the degree of its public importance are not to be too nicely and scrupulously weighed.

There are two English cases that must not be overlooked. One of them (*The King v. Bank of England*, 2 B. & Ald. 620) was upon an application by a stockholder of that bank for a mandamus to compel the governor and company of the bank to produce their accounts and make a dividend of the profits. The court refused to grant the writ, ABBOTT, C. J., saying: "This is an application for a mandamus to a trading corporation, at the instance of an individual member, to compel his copartners to produce their accounts of profit and loss, and to divide their profits, if any there be. The examination of the accounts of a trading company may be effectually entered into in the court of chancery, but this court is a very unfit tribunal for such a subject. A mere trading corporation differs materially from those which are intrusted with the government of cities and towns, and therefore have important public duties to perform. No instance has been cited in which the court has granted a mandamus to a corporation like the present, and I think we ought not now to establish the precedent." BEST, J., said: "If we were to grant this rule, we should make ourselves auditors to all the trading corporations in England." The other case (*The King v. London Assurance Co.*, 5 B. & Ald. 899) was a petition for a mandamus to compel a transfer of shares standing in the name of a bankrupt stockholder to his assignees. The court say: "We are not aware of any instance of a mandamus like the present having ever been granted, and if we were to grant this, we should be called upon to interfere in all cases of dispute between the members of private corporations. This company, although carried on under a royal charter, is a mere private partnership. But the writ of mandamus is a high prerogative writ, and is confined to cases of a public nature. Rule refused."

Both of the above were cases against a corporation, in that respect differing from the case at bar. It is very manifest that neither of them would have justified the issue of the writ. But it is equally manifest that the impropriety of issuing the writ in those cases had

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very little to do with the question whether the corporation was of a public or a private character. The real difficulty was in the nature of the applicant's interest, and the character of the investigation proposed. The court might well refuse to be the auditor of accounts for a trading company. It is not claimed that the process of mandamus against a corporation is suitable or proper for the investigation of the details of commercial business, or for the adjustment of matters in the nature of partnership accounts. The case at bar is not a process of a private stockholder against a corporation, but a petition by the corporation to protect itself in the enjoyment of its chartered rights, and to secure to itself the benefit of a due and legal organization. "There has been a good deal of refinement and subtlety in the distinctions which have been applied to the decision of questions of this kind, so that it is not very easy to say when a mandamus ought to be granted, or not." Grant on Corp. 272. It is very clear that it ought not to be granted where the court can see that the question arises merely from an indisposition of the minority to be controlled by the majority; or where it is sought merely for the auditing of accounts, or settling disputes such as arise among copartners, or going into the details of commercial affairs. The refusal of the writ in such cases does not appear to stand upon the ground that the court will not so interfere with private corporations; "because it often has so interfered." Grant on Corp. 272. But we think that a writ of mandamus might very properly issue on the application of a manufacturing corporation, where it is essential to justice, in the way of securing the benefits of its charter, or the due and proper observance of the laws in relation to its organization. The case at bar presents an instance in which a minority of the stockholders, by the use of illegal votes, have usurped powers that do not belong to them, and have deprived the majority of its power to govern. We do not think that, under such circumstances, and in the exercise of our discretion, the mandamus should be refused for the sole reason that the party seeking redress is a manufacturing corporation.

Peremptory mandamus to issue.

Newhall and Wife v. Lynn Five Cents Savings Bank.

NEWHALL AND WIFE V. LYNN FIVE CENTS SAVINGS BANK AND
OTHERS.

(101 Mass. 428.)

Husband and wife — right of dower in mortgaged premises — surplus after sale.

The wife's inchoate right of dower, in lands, which were mortgaged at the time her husband became the owner thereof, ceases at the sale of the lands, during the life-time of the husband, under a power in the mortgage, and she is not entitled to a share in the surplus.

BILL in equity to obtain possession of a portion of the surplus arising from the sale of mortgaged premises. The case was heard before COLT, J., and the following facts were reported to the full court: Nichols was the owner of an estate in fee in Lynn, which he mortgaged to the Lynn Five Cents Savings Bank, by a deed containing a power of sale, "which sale shall forever be a perpetual bar, both in law and in equity, against the said grantor, his heirs and assigns, and all persons claiming under him or them, from all rights and interests in the premises." The mortgagee, the bank, was also directed therein, "out of the money arising from such sale, to retain all sums then secured by this deed, paying the surplus, if any, to the grantor or his assigns." The estate was then conveyed by Nichols to Newhall, at that time the husband of Maria B. Newhall. The conveyance was subject to the mortgage, which was not redeemed by Newhall, who became bankrupt in September, 1867; and the estate was sold, under the power in the mortgage, in July, 1868. After satisfying the debt secured by the mortgage, there remained a considerable surplus, which the wife of Newhall now claims should be divided between herself and the assignees in bankruptcy of her husband. The assignees claim the whole surplus.

R. D. Smith, for Mrs. Newhall, cited the Gen. Stats., ch. 90, § 2; *Snow v. Stevens*, 15 Mass. 278; *Denton v. Nanny*, 8 Barb. 618; *Vartie v. Underwood*, 18 id. 561; *Heth v. Cocke*, 1 Rand. 344, *Gardner v. Hooper*, 3 Gray, 404; *Davis v. Newton*, 6 Metc. 543, and cases cited; *Russell v. Rumsey*, 35 Ill. 362; *Rose v. Sanderson*, 38 id. 247; 1 Scrib. on Dow. 480; *Mills v. Van Vocrhies*, 20 N. Y. 412; Story's Eq., §§ 1411, 1412; *Jackson v. Edwards*, 7 Paige, 391; *Weaver v. Gregg*, 6 Ohio St. 547; *Burns v. Lynde*, 6 Allen, 305.

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J. D. Ball, for the assignees.

Newhall died after the filing of the first bill, and a supplemental bill was filed after the argument in the case.

COLT, J. The wife's inchoate right of dower in the equity of redemption in lands, of which her husband becomes seized, subject to a mortgage valid against him, or in which she has released her right to dower, is recognized as a valuable interest in her. It is regarded as something more than a mere possibility, although it becomes consummate only when she survives her husband. Her husband cannot deprive her of it, but it is liable to be defeated by a foreclosure of the mortgage in his life-time, or by her own voluntary act. Gen. Stats., ch. 90, § 2; ch. 107, § 38; and ch. 140, § 144.

It has been held that this right is entitled to protection, in favor of the wife, against extinguishment by foreclosure, especially when the husband has parted with his whole estate in the land and can no longer be regarded as representing the interests of his wife. And a bill to redeem, brought by her, was maintained in *Davis v. Wetherell*, 13 Allen, 60. She has been allowed to maintain a suit in equity to set aside a deed purporting to release this right, which had been executed in blank and afterward filled up. *Burns v. Lynde*, 6 Allen, 305.*

In the case at bar, the husband became seized, during coverture, of an equity to redeem land from a mortgage given by one Nichols to the defendant bank, containing a power of sale which, when executed, was therein declared to be a perpetual bar, both in law and equity, against the grantor, his heirs and assigns, and all persons claiming under him or them, from all rights and interest in the premises, and which authorized the bank to retain, out of the money arising from the sale, all sums thereby secured, paying the surplus, if any, to the grantor or his assigns. This mortgage was regularly foreclosed by a sale under the power, during the life-time of the husband. And the wife now asks that she may be allowed to share in the surplus proceeds, and that the same be apportioned by a decree of this court between her husband's assignees in bankruptcy and herself.

We are of opinion that there is no case shown for the interference of a court of equity, exercising only ordinary powers in addition to those specially granted. The wife is, indeed, often without the means to pay the mortgage debt, in these cases. The husband may

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be unwilling or unable to pay. And the estate may be worth and actually sell for much more than the mortgage debt, and yet, if the sale be honestly and fairly made, her right in the property and its proceeds is gone. The title of her husband in the real estate in which she claimed an interest has been wholly defeated by a paramount title in the mortgagee. His right of redemption has been converted into a claim upon the surplus money in the hands of the mortgagee. The contingency has arisen to which her inchoate right of dower was originally subject. Her husband's estate in the land was subject to be converted into personalty by a sale under the mortgage. It has been so converted, and belongs to those who are entitled to his personal estate. *Varnum v. Meserve*, 8 Allen, 158. At any time before the sale, as we have seen, she could bring her bill to redeem, and protect herself sufficiently against an unreasonable refusal, on the part of her husband's assignees, to pay the mortgage, especially when such refusal is with intent to defeat her interest, by suffering a sale to be made. It is too late, after a foreclosure, and a conversion of the estate into money, for an application on her part to share in the proceeds. She is as much barred of her right as if the foreclosure had been without sale, by entry for breach of condition, and lapse of time. *Pitts v. Aldrich*, 11 Allen, 39. Foreclosure by sale is declared to be effectual to bar all claim or possibility of dower in the property. Gen. Stats., ch. 140, § 44.

It is urged against this, that, the mortgage debt having been paid, the mortgagee now holds a fund, consisting of the surplus in his hands, which is substituted for the equity of redemption in which the wife has equitable rights. But neither the doctrine, which requires the assignees of the husband in bankruptcy to make a settlement upon her out of her choses in action assigned to them, nor the principle of equitable conversion, by which effect is given to the contracts of parties, and money is treated as land, or land as money, in furtherance of their intentions, seems to us to support this claim.

We are referred to no decisions which have the weight which belongs to the decisions of courts of final resort, in which the power here invoked has been exercised. Two cases are cited from New York in support of it—*Denton v. Nanny*, 8 Barb. 618, and *Vartie v. Underwood*, 18 id. 561. These do not appear to have been affirmed by the court of appeals. And there are many cases in the courts of that State in which the contrary is held. *Titus v. Neilson*,

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5 Johns. Ch. 45; *Bell v. Mayor of New York*, 10 Paige, 49. In *Frost v. Peacock*, 4 Edw. Ch. 678, where the husband died after sale and confirmation, but before the money had been distributed, it was held that the widow could not be endowed of the surplus. 1 Scrib. on Dow. 480.

The death of the husband since the filing of the original bill, which, by supplemental bill, has been brought to our knowledge since the first argument, cannot affect the result to which we come. The rights of all parties were fixed at the time of filing the original bill.

Bill dismissed, with costs.

MURPHY AND WIFE V. DEANE AND OTHERS.

(101 Mass. 455.)

Accidents — rule of law in cases of negligence.

In an action by the plaintiff for injuries received by her while walking on the sidewalk in a city, in consequence of the alleged negligence of defendants' servants in unloading merchandise, the plaintiff prayed for the following instructions: 1. "That the question for the jury was, whether the injury was occasioned entirely by the negligence or improper conduct of the defendants' servants, or whether the plaintiff herself so far contributed to the misfortune, by her own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on her part, the misfortune would not have happened; that, in the first case, the plaintiff would be entitled to recover, and, in the second, she would not." 2. "That mere negligence, or want of ordinary care or caution, will not disentitle the plaintiff to recover, unless it be such that, but for that negligence, or want of ordinary care and caution, the misfortune could not have happened, nor if the defendants might, by the exercise of care on their part, have avoided the consequences of the neglect or carelessness of the plaintiff." *Held*, that the instructions prayed for did not embody the correct rule of law in cases of negligence; but that the rule was, that "whenever there is negligence on the part of the plaintiff, contributing directly, or as a proximate cause, to the occurrence from which the injury arises, such negligence will prevent the plaintiff from recovery; and the burden is always upon the plaintiff to establish either that he himself was in the exercise of due care, or that the injury is in no degree attributable to any want of proper care on his part."

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ACTION in tort to recover for injuries received by the plaintiff, Mrs. Murphy, from the alleged negligence of the defendants' servants. It appeared that Mrs. Murphy was passing along the sidewalk in Boston where the servants of the defendants were engaged in unloading and delivering from a wagon a cask of oil across the sidewalk into the warehouse of Mixer & Whitman there situate, and that while Mrs. Murphy was attempting to pass over and across the skids, then and there placed by the defendants' servants from the wagon across the sidewalk into the warehouse, a cask of oil slipped upon her and injured her severely and permanently about the hip and leg. At the trial, in the superior court, much evidence was taken which substantiated the above statement of facts, and tended to prove or disprove negligence on the part of the parties to the action. The plaintiffs requested the judge to rule "that the question for the jury was, whether the injury was occasioned entirely by the negligence or improper conduct of the defendants' servant, or whether the female plaintiff herself so far contributed to the misfortune, by her own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on her part, the misfortune would not have happened; that, in the first case, the plaintiffs would be entitled to recover, and in the second they would not."

Plaintiffs further asked the judge to rule "that mere negligence, or want of ordinary care or caution will not disentitle the plaintiffs to recover, unless it be such that, but for that negligence, or want of ordinary care and caution, the misfortune could not have happened, nor if the defendants might, by the exercise of care on their part, have avoided the consequences of the neglect or carelessness of the female plaintiff."

Defendants also submitted requests, but the judge did not charge precisely as requested.

"The judge did not instruct the jury in the terms requested by either party; but, among other things, instructed them that, to maintain the action, the plaintiffs must prove, in the first place, that the female plaintiff, at the time of the accident, was in the exercise of ordinary care; and, in the second place, that the defendants were not in the exercise of ordinary care; that if the jury found that, at the time of the accident, the female plaintiff was guilty of negligence, or want of ordinary care, and this contributed to the accident, she would not be entitled to recover, although the jury

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might also find that the defendants were guilty of negligence, or want of ordinary care; that the law would not calculate or measure the comparative negligence or want of ordinary care of the two parties, if both were in fault, but if the female plaintiff's own negligence, or want of ordinary care, contributed to the accident, the plaintiffs could not recover."

Defendants again requested a ruling, "that, if the female plaintiff, seeing that the skids were down, and that the parties were in the act of unloading by running the cask down, undertook to cross under such circumstances and when the cask was coming down, she must do it at her own risk; that going across the skids in front of a cask coming down would be a want of due care." The judge replied, "that he did not feel it his duty to so instruct the jury; that it would be so, if she recklessly threw or put herself in front of the cask, but if she had reasonable cause to believe that she could cross with safety, it would not be a want of due care in attempting to do so."

Verdict for defendants and plaintiffs appealed from the rulings.

N. St. J. Green (C. R. Train with him), for appellants, cited *Tuff v. Warman*, 5 O. B. (N. S.) 573; *Scott v. Dublin & Wicklow Railway Co.*, 11 Irish O. L. 377; *London, Brighton & South Coast Railway Co. v. Walton*, 14 Law Times (N. S.) 253; S. O., Harr & Ruth. 424.

A. A. Ranney, for defendants, cited *Smith v. Smith*, 2 Pick. 621; *Lane v. Crombie*, 12 id. 177; *Brown v. Kendall*, 6 Oush. 292; *White v. Winnisimmet Co.*, 7 id. 155; *Horton v. Ipswich*, 12 id. 488; *Parker v. Adams*, 12 Metc. 415; *Holly v. Boston Gas Light Co.*, 8 Gray, 123; *Spofford v. Harlow*, 3 Allen, 176; *Wright v. Malden & Melrose Railroad Co.*, 4 id. 283; *Counter v. Couch*, 8 id. 436; *Callahan v. Bean*, 9 id. 401.

WELLS, J. The instructions given to the jury, in regard to the conditions upon which liability of the defendants must depend, were correct, and sufficient for the case that was presented by the facts, and were carefully expressed and guarded. We do not understand that any objection is made to what they contain. The plaintiffs contend that they are not equivalent to the instructions prayed for; and that they are entitled to a new trial on account of that deficiency.

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We are of opinion that whatever is contained in the instructions prayed for, beyond what is in those given, or inconsistent therewith, is not in accordance with the well-established principles of law. The difference appears to be this. It is contended that contributory negligence on the part of the female plaintiff ought not to defeat the action, unless it should appear that, in the particular case, it did in fact contribute to such an extent that the injury could not or would not have occurred but for her negligence. The counter-proposition, which we think to be more nearly a true statement of the legal principle, is, that there can be no recovery unless it shall appear that the injury happened, or would have happened, irrespectively of any negligence on the part of the female plaintiff. This is necessarily involved in the general rule, which applies to all cases of this nature, to wit, that the plaintiff must show not only negligence on the part of the defendant, but due care on his own part. That the burden of proof rests upon these plaintiffs to maintain both of these points is clearly established by the authorities cited by the defendants, and rests, as we think, upon sound principle. The plaintiffs do not sustain that burden, if the proof leaves it in doubt whether or not the injury resulted in whole or in part from the fault of the female plaintiff.

The last part of the instructions prayed for suggests another question, which, in certain conditions of facts, may require careful consideration, to wit: how far the obligations and liabilities of one party are modified toward the other, after knowledge of a negligent exposure, by the latter, to danger from the acts or neglect of the former. In such case, what would otherwise have been mere negligence may become willful or wanton wrong, or may take the place of the sole direct or proximate cause, the negligence of the other party being then regarded as a remote, and not a contributory, cause. But no such question arises upon the facts of the present case.

The instructions of the court were all that were required by the facts, and the verdict is well warranted by the testimony. We should not consider further discussion necessary or appropriate, but that we observe that the prayer for instructions is framed in the precise terms of a statement by Mr. Justice WIGHTMAN in the case cited of *Tuff v. Warman*, 5 C. B. (N. S.) 573, which statement also forms the head-note of the report of that case.

The verdict in that case was for the plaintiff. The judge at nisi

prius had instructed the jury that negligence of the plaintiff, contributing directly to the injury, would defeat his recovery. The only question was, whether the use of the term "directly" was not too restrictive, and likely to mislead the jury; and the verdict was sustained on the ground that the other portions of the charge made it clear that the jury must have understood the term as distinguishing between proximate and remote causes. The real question in the case was, not so much the effect of contributory negligence, as whether the alleged negligence of the plaintiff was so remote as not to bear the character of contributory negligence. Throughout the discussion the general doctrine is recognized that negligence of the plaintiff, co-operating to produce the result, will defeat the action; that the negligence of the defendant must be the sole cause of the injury. It is so explained by Mr. Justice WILLES in the case of *London, Brighton and South Coast Railway Co. v. Walton*, 14 Law Times (N. S.), 253; S. C., Harr. & Ruth, 424; and so understood in *Scott v. Dublin and Wicklow Railway Co.*, 11 Irish C. L. 377.

It is apparent that the statement taken from *Tuff v. Warman* entirely overlooks the practical application of the rule as a guide in the trial of a cause. It was probably made without reference to the burden of proof. It not only fails to take into account the well-settled principle that the burden is upon the plaintiff to show due care on his own part, but, by its form, implies the contrary. We think, however, that the statement will be found to be faulty in substance, as well as in form. One of the propositions in this statement is, that "mere negligence, or want of ordinary care or caution, will not disentitle the plaintiff to recover, unless it be such that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened." There is certainly nothing indicated in this proposition for the plaintiff to establish affirmatively. More than this, if it should appear that the negligence of the defendant was an adequate cause to produce the result, the plaintiff must recover, even though he was himself equally, or even to a greater degree than the defendant, in fault. If the case can be supposed in which both parties were equally in fault, the fault of each being equally proximate, direct and adequate to produce the result, so that it might have occurred from the conduct of either without the fault of the other, there would then be a case of contributory negligence, for the consequences of which neither

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could recover from the other. But upon the statement quoted from *Tuff v. Warman*, neither would be "disentitled," and therefore both could recover, if both suffered injury, each from the other. Every case in which the proof fails to show, or leaves it in doubt, which of two sufficient causes was the actual proximate cause of the injury, is practically such a case. It is manifest from this illustration, that, as a definition of the limits of the right to recover in such cases, the proposition referred to must be logically incorrect. Eliminating negatives from the first branch of the proposition, it is, that a plaintiff may recover in such cases, unless the misfortune could not have happened but for his own negligence. This, as we have seen, being stated affirmatively, is too broad, and not correct; although its supplement or negative counterpart is correct, as far as it extends—to wit, that he cannot recover if the misfortune could not have happened but for his own negligence.

In *Greenland v. Chaplin*, 5 Exch. 248, Chief Baron POLLOCK states the rule "that, when the negligence of the party injured did not in any degree contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action." Except that, in form of statement, it leaves out of view the consideration of the burden of proof, this seems to us to be accurate, and in accordance with the current of authorities. See *Dowell v. General Steam Navigation Co.*, 5 El. & Bl. 195; *Bridge v. Grand Junction Railway Co.*, 3 M. & W. 244; *Johnson v. Hudson River Railroad Co.*, 20 N. Y. 65; *Trow v. Vermont Central Railroad Co.*, 24 Vt. 487; *Beers v. Housatonic Railroad Co.*, 19 Conn. 566.

The statement in *Tuff v. Warman* proceeds thus: "Nor if the defendants might, by the exercise of due care on their part, have avoided the consequences of the neglect or carelessness of the plaintiff." This, as already suggested, may be correct as applied to a case like *Tuff v. Warman*, where the negligence of the plaintiff was in a certain sense remote, preceding the negligent conduct of the defendant. But where the negligent conduct of the two parties is contemporaneous, and the fault of each relates directly and proximately to the occurrence from which the injury arises, the rule of law is rather that the plaintiff cannot recover if by due care on his part he might have avoided the consequences of the carelessness of the defendant. *Lucas v. New Bedford & Taunton Railroad Co.*, 6 Gray, 64; *Waite v. Northeastern Railway Co.*, 9 El. & Bl. 719; *Robinson v. Cone*, 22 Vt. 218. Suppose the case of a collision upon a pub-

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lic. highway; both parties careless and equally in fault, but either, by the exercise of proper care on his part, might have avoided the consequences of the carelessness of the other. By the proposition last quoted from *Tuff v. Warman*, each would be liable to the other, and each would be entitled to recover from the other, for whatever injuries he might have thus received.

We think it is manifest that the rule thus laid down in *Tuff v. Warman* is not the correct rule of law which governs ordinary cases of injury by negligence; but whenever there is negligence on the part of the plaintiff, contributing directly, or as a proximate cause, to the occurrence from which the injury arises, such negligence will prevent the plaintiff from recovery; and the burden is always upon the plaintiff to establish either that he himself was in the exercise of due care, or that the injury is in no degree attributable to any want of proper care on his part. *Trow v. Vermont Central Railroad Co.*, 24 Vt. 487; *Birge v. Gardiner*, 19 Conn. 507.

Exceptions overruled.

NOTE. — On the subject of contributory negligence, see *Chicago & Alton R. R. Co. v. Pondrom*, 3 Am. R. 808. — REP.

WILLIAMS V. POWELL.

(101 Mass. 487.)

False imprisonment — removal of attached goods.

An officer attached an attorney's desk and library of not more than \$200 in value, situated in the office of a broker, kept possession of the office for more than five hours of daylight, and then, after demanding and being refused a key, obtained one from a locksmith for the purpose of continuing his possession. The broker caused another lock to be put on the door, and after giving the officer notice to remove the goods immediately and his refusing to do so, locked him in for the night. In an action for assault and false imprisonment, *held*, that the officer delayed removing the goods for an unreasonable length of time; that he abused his authority and became a trespasser, and that he could therefore not recover.

ACTION for assault and false imprisonment.

The plaintiff, a constable of Boston, received a summons and attachment against one Keyes, an attorney at law, with directions

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to attach the furniture and library of Keyes, in the office of said Keyes. Keyes occupied, with his desk and library, a portion of the office of Powell, the defendant, an insurance broker in Boston, under a parol license for a stipulated monthly sum.

The plaintiff attached the desk and law books of Keyes in defendant's office, at about two o'clock in the afternoon, and left a keeper to hold possession. About six o'clock plaintiff returned to the office and demanded a key of both Keyes and defendant, which was refused. Plaintiff then procured a key from a locksmith. The defendant then caused another lock to be put upon the door, and after requesting the plaintiff to remove immediately any property which he claimed to hold, and himself leave the office, the plaintiff replied that he could not do so that night, but would the next morning. The defendant thereupon went out and locked the plaintiff and his keeper in the office, where the former remained three hours, getting out of a window, and the latter all night. The plaintiff offered to show that he had followed the usage among officers; also, that, after the demand to remove the property was made, he did not have reasonable time to comply. These offers were refused and the judge directed a verdict for the defendant. The plaintiff appealed.

R. Lund, for the plaintiff.

C. G. Keyes, for defendant.

GRAY, J. The evidence in this case wholly fails to support the charge of assault or false imprisonment. An officer has no right to make use of the tenement of one person to keep goods attached on a writ against another for a longer time than is reasonably necessary to remove them. *Rowley v. Rice*, 11 Metc. 337. What is reasonable time, when depending on undisputed facts, is a question of law. *Spoor v. Spooner*, 12 Metc. 285; *Pratt v. Farrar*, 10 Allen, 521. Five hours of daylight were clearly more than a reasonable time to remove an attorney's desk and law books of not more than \$200 in value. The plaintiff had no right as against the defendant to hold possession of his office until he could see the debtor; and, by keeping possession of the defendant's office for more than five hours, and then, after demanding and being refused a key, obtaining one from a locksmith for the purpose of continuing his

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possession, he abused his authority and became a trespasser. *Malcolm v. Spoor*, 12 Metc. 279. Under such circumstances, the defendant was justified in giving him notice to remove immediately, and, on his refusing to do so, in securing the door for night; and the plaintiff, if he chose to remain inside, had no cause to complain of being locked in. *Spoor v. Spooner*, 12 Metc. 281. Testimony that it was the custom of other officers to behave as unreasonably as this plaintiff would not show his conduct to be reasonable or lawful. It was therefore rightly ruled that such testimony was inadmissible, and that the plaintiff could not maintain his action.

Exceptions overruled.

DORR AND OTHERS V. HARRAHAN.

(101 Mass. 531.)

Injunction — construction of deed.

A grantee under a conveyance with a restriction that none but a dwelling-house shall be erected on the premises and that the "building, when erected, is not to be occupied for the purpose of carrying on any offensive trade or calling whatever," cannot use a part of a dwelling, so erected, as a grocery store.

INJUNCTION to restrain the grantee of a lot of land from an alleged violation of a restrictive provision in the deed. It was agreed by the parties at the trial that the original owners of the land, comprising the lot in question, had agreed among themselves to divide it into lots, and to build or have built thereon dwellings of uniform height and distance from the street. This restriction was embodied in the deeds of several persons who bought some of these lots from the original owners; and on the 22d day of April, 1859, one of the original lots was conveyed to the defendant by a deed, embracing the following condition:

"This conveyance made subject to the following restrictions; that no building is to be erected on said lot, except a dwelling-house of uniform height with the other houses on the other lots shown on the plan (being said eight other lots), and not less than three stories, and the exterior walls to be of brick, stone or iron, and to be set back from the line of Davis street at least seven feet, except

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outbuildings in the rear of the main house; and said buildings, when erected, are not to be occupied for the purpose of carrying on any offensive trade or calling whatever;" it was further agreed, "that, a short time before the filing of the bill, the defendant determined to erect a building on his lot, set back from the street the required distance, the upper stories of which were intended by him to be used and constructed as a dwelling-house, and the first story and basement of which were intended by him to be used as a retail grocery store, and constructed as such; that, at the time of learning of the defendant's intention, and before filing the bill, the plaintiffs gave notice to the defendant, and requested him, to desist from erecting his building, but he declined to do so; that, at the time of the filing of the bill, he had prepared his plan, laid the foundation, and just commenced the superstructure of the building; that, after the injunction had been issued, the defendant had erected on his lot a brick and stone building, set back the requisite distance from the street, the first story of which had but one room; that the stories of the building above the first were constructed as a dwelling-house, and the defendant proposed to use them as such, for the residence of himself and his family; that the room comprising the first story was separated by a sheathed partition from the rest of the building, and had no entrance to the rest of the building, except through a door leading into a passage-way, which passage-way was in the rear of the first story; and that there was an entrance from the inside of the first story to the cellar, and the cellar had a doorway and steps leading into it from the street, large enough to admit the passage of hogsheads and barrels."

The defendant contended that he had erected the building to a point where he could abide the decision of the court, intending to erect the first story as a grocery, or, if not allowed to do this, to erect it as a dwelling, and use it as a grocery afterward. The case was reserved for the full court.

I. D. Ball, for plaintiffs.

A. A. Ranney, for defendant.

AMES, J. This case closely resembles, in many respects, the preceding one of *Linzee v. Mixer*, 101 Mass. 512, and falls within the same rule. The grantee in each case holds only a qualified and limited title, and is carefully restricted as to the kind of building that

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he shall erect, and the use that he shall make of it. In each case he is endeavoring to get rid of the condition which made a material part of the title that he purchased and accepted, and to acquire a larger title than his deed gives him. In this case there has been nothing on the part of the grantors bearing any resemblance to acquiescence, and there is no suggestion that they have been guilty of any laches that should interfere with the enforcement of their rights.

The defendant insists that such conditions and restrictions in a deed are not to be favored, and that they are not to be extended, by implication, beyond the most bare and literal interpretation of the terms in which they are expressed. He admits that, by the deed, he can build nothing but a dwelling-house; but he also insists that he is at liberty to change this dwelling-house, when built, into a place of business. The deed provides that the "buildings, when erected, are not to be occupied for the purpose of carrying on any offensive trade or calling whatever;" and he claims that, under a literal construction of this expression, he may establish a grocery in his dwelling-house, provided it be conducted, as it may be, in an inoffensive manner. But this mode of dealing with the condition deprives it of all force whatever, and seems to us to be a mere evasion. There is nothing in the condition that appears to be unreasonable, or contrary to the policy of the law; and there is no reason for doing violence to the language in which it is expressed, or perverting its true meaning. Some kinds of industry might be carried on in a dwelling-house without any inconvenience whatever to the neighborhood. The house might be occupied by a physician or a lawyer, perhaps by a chemist or photographer, and a portion of it set apart as an office or place of business, without any offense or objection. All this would be allowable under the deed. But to change a dwelling-house into a grocery, a work-shop, or a market, would be a very different matter. The condition cannot fairly be construed as having any other meaning than to prescribe the kind of building that shall be erected, and the manner in which it shall be used and occupied. Even if the bald and literal construction contended for by the defendant could be sustained, it is by no means certain that under his answer it would be of any avail to him. He admits that in building his house he had it in view to finish a part of it for use as a grocery.

Injunction made perpetual, with costs for the plaintiffs.

Odione v. New England Mutual Marine Insurance Co.

ODIONE V. NEW ENGLAND MUTUAL MARINE INSURANCE CO.

(101 Mass. 551.)

Marine insurance — construction of policy.

A marine insurance company issued its policy on plaintiff's vessel, containing a clause as follows: "Prohibited from the river and gulf of St. Lawrence, Northumberland straits, or Cape Breton, and Black sea, between October 1 and May 1." The vessel was in one of the prohibited ports in March, soon after the insurance was effected, and was lost at sea many months afterward. *Held*, that the implied warranty of the clause contained in the policy had been broken, and plaintiff could not recover.

ACTION on a policy of marine insurance on a vessel owned by plaintiff. The policy was issued March 2, 1867, insuring the vessel *Zero* for one year from February 26, 1867, and containing a clause as follows: "Prohibited from the river and gulf of St. Lawrence, Northumberland straits, or Cape Breton, and Black sea, between October 1 and May 1." The vessel was at Cape Breton in March, 1867, then returned to New York, and in December sailed from St. Johns, Newfoundland, bound for Sydney, Cape Breton, when she was lost at sea January 10, 1868. The superior court sent the case to this court on these facts; and the following additional evidence was taken subject to the opinion of this court as to its admissibility: "that, when the policy was delivered to the plaintiff's agent, he objected to the clause above given, and stated to the president of the defendants that the vessel would probably want to use some of the prohibited ports, and the president replied that the effect of the clause was to exclude risks in such ports only, but not to vitiate the policy, and in that case he could come in and make an agreement for an additional premium, or take the risk himself while in such ports; that a custom exists with the underwriters of Boston to construe said clause as excluding any risks in the prohibited ports, but not that such use vitiates the policy; that for the year previous to February 26, 1867, the plaintiff insured the same vessel with the defendants, by a policy containing the same clause as the one quoted, and, when the insurance was effected, the vessel was in Sydney, a prohibited port, and it was so stated in the application for insurance, and the defendants issued their policy, and at the end of the year demanded and collected of the plaintiff the premium for such year."

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M. E. Ingalls, for the plaintiff.

H. C. Hutchins, for the defendants.

CHAPMAN, C. J. As a policy of insurance is a written instrument, its language must be regarded as expressing what the parties intended to agree upon, and the court must construe it without being influenced by the oral statements of either party. Therefore, the oral statements of the president of the company as to the construction of the policy in this case, which were offered in evidence by the plaintiff, are inadmissible. The usage which was offered to be proved is also inadmissible. *Seccomb v. Provincial Insurance Co.*, 10 Allen, 305. It is merely a usage among underwriters in Boston to construe a clause of the policy in a particular way. The clause in question is: "Prohibited from the river and gulf of St. Lawrence, Northumberland straits, or Cape Breton, and Black sea, between October 1 and May 1." There is nothing in this language so technical or peculiar, or having such application to a particular trade or branch of business, or a particular method of managing business, as to require the evidence of usage to explain it, within the principles stated in *Eaton v. Smith*, 20 Pick. 150, *Macy v. Whaling Insurance Co.*, 9 Metc. 354, or *Crocker v. People's Insurance Co.*, 8 Cush. 79. But the proposition is, in effect, to resort to the underwriters in Boston as authority for the legal construction of a contract containing ordinary language.

The evidence offered to prove that, in a prior year, the company insured the same vessel, by a similar policy, while she was in a prohibited port, and that the policy was treated as valid, is also inadmissible. The waiver of the prohibition in that case does not aid us in the interpretation of the policy before us.

In March, 1867, the vessel used a port in Cape Breton, and afterward returned to New York in safety. On December 24, 1867, she sailed from St. Johns, Newfoundland, for Sydney, Cape Breton, a prohibited port; and when a short distance out of St. Johns, she was struck by a gale and driven out into the middle of the Atlantic ocean where she was lost by the perils insured against, on January 10, 1868. The principal question presented is, whether the word "prohibited" constitutes a warranty that the vessel shall not go to the places designated within the prescribed time.

No particular form of words is necessary to constitute a warranty;

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and though the assured has signed no writing, but has merely accepted a policy which the insurer has signed and delivered to him, yet its statements as to what he or the vessel shall do, or as to what condition she shall be in, are often regarded as warranties on his part. No case is cited in which the word "prohibited" has been construed by direct adjudication. But words which are equivalent to a prohibition are regarded as amounting to a warranty. Thus, in *Colledge v. Harty*, 6 Exch. 205, the clause which was held to be a warranty was a rule, subjoined to the policy, that the vessels insured "were not to sail to or from" certain specified ports at certain specified seasons. In *Sawyer v. Coasters' Insurance Co.*, 6 Gray, 221, the words "not allowed" to carry grain in bulk, etc., seems to have been so regarded, though the point was not directly decided. See also *Palmer v. Warren Insurance Co.*, 1 Story, 360. In the present case, the clause above cited amounts to a statement that the vessel insured shall not be allowed by the assured to enter the waters specified within the times prescribed, and such a statement comes within the proper definition of a warranty, and must be regarded as such.

A warranty is held to be a condition precedent; it must be literally fulfilled, and a breach of it makes the policy void. 1 Arnold on Ins., §§ 213-215. In the present case, there can be no doubt that, if the prohibition amounted to a warranty, it was violated, in March, 1867, by the use of a port in Cape Breton. It is not necessary, therefore, to consider the effect of the voyage to Sydney; for the policy had already become void.

Judgment for the defendants.

McAllister v. New England Mutual Life Insurance Co.

McALLISTER, Administratrix, v. NEW ENGLAND MUTUAL LIFE INS. Co.

(101 Mass. 558.)

Construction of life insurance policy

A life insurance policy was issued to plaintiff's decedent in April, 1866, expressed to be made in consideration of a premium, already paid, and of a like sum to be annually paid during the continuance of the policy, and providing that the policy should "not take effect until the premium was paid," and that the policy should be forfeited "in case any premium due upon the policy should not be paid at the date when payable." The first premium was paid partly in cash and partly in promissory notes, but the notes were not paid, and the insured died March, 1867. *Held*, that the policy had taken effect, and that the non-payment of the notes did not bar plaintiff's recovery, because the "forfeiture" clause referred to premiums after the first.

ACTION on a life insurance policy, by the administratrix of the insured. The case was submitted. On the 11th of April, 1866, the defendant issued its policy of life assurance to Samuel McAllister for \$5,000, expressed to be made "in consideration of the premium of \$120.50 to said company paid by Samuel McAllister, being the assured in this policy, and of a like sum to be paid to them by said assured on or before the 11th day of April in every year during the continuance of this policy," and providing that, "in case any premium due upon this policy shall not be paid at the day when payable, the policy shall thereupon become forfeited and void," except for a short temporary insurance computed on premiums already paid. The policy further provided that "this policy, and any sums that shall become due thereon from said assured, are pledged and hypothecated to said company, and they have a lien thereon to secure the payment of any premium on which credit may be given, and of any note or security therefor, but this pledge and hypothecation shall in no respect affect the provisions respecting the forfeiture of this policy; this policy does not take effect until after the premium is paid." The first premium was paid as follows: \$30.12 in cash; one promissory note, dated April 16, 1866, for \$30.13, payable in six months, and designated as being in part of premium on the policy; one promissory note, dated April 11, 1866, for \$60.25 and interest, payable after the expiration of five years, and designated as being for

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part of the premium on the policy, "which policy and all amounts payable thereon, for returns of premiums and distribution or loss, are hereby pledged and hypothecated to said company for the payment of the notes, said policy being agreed to be subject to forfeiture, and to become void in case of non-payment of principal and interest of this note, in compliance with the terms thereof."

By the policy and the statute of 1861, chapter 186, the cash payment created a temporary insurance until Nov. 6, 1866. The notes were not paid by the assured. Payment of the first note was demanded when it became due, but refused; and the refusal was accompanied with the statement on the part of the assured that "he would not have any thing more to do with the company, and abandoned the whole thing." But the company continued to hold the notes, and the assured to hold the policy. March 7, 1867, Samuel McAllister, the assured, died; notice and proof of the death of the assured was duly presented to the company; the plaintiff was appointed administratrix and brought this action.

H. G. Hutchins, for plaintiff.

D. Foster & G. W. Baldwin, for defendants.

GRAY, J. The policy upon which this action is brought is expressed to be made in consideration of a premium already paid, and of a like sum to be paid annually during its continuance, and "does not take effect until the premium is paid." But it is agreed by the parties, in the case stated, that the defendants made and delivered the policy to the assured, and at the time of the delivery took for the first premium a certain sum in cash, and two notes of the assured, one payable in six months, and the other on demand after five years. Whatever were the powers of the directors, the corporation itself might certainly take notes for part of the premium, instead of insisting on immediate payment of the whole. *Hodsdon v. Guardian Insurance Co.*, 97 Mass. 144. The policy thus took effect as a binding contract, and the question is, whether it was terminated before the death of the assured.

The defendants rely upon that provision of the policy which declares that, "in case any premium due upon the policy shall not be paid at the day when payable, the policy shall thereupon become forfeited and void," except for a certain period which had expired before the death of the assured in this case. But the court is of

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opinion that this clause, which is inserted for the benefit of the insurers, and to be construed most strongly against them, and which merely provides that the policy "shall become forfeited and void," in case a premium "shall not be paid at the day when payable," can only apply to a policy which has once taken effect, and to non payment of a premium payable after that time, and cannot be held to refer to that premium which the policy contemplates and requires to be paid before the contract of insurance has any binding force.

This policy does not provide that it shall be avoided or forfeited upon the failure to pay any note or obligation given for a premium, and differs in that respect from the cases of *Pitt v. Berkshire Insurance Co.*, 100 Mass. 500, and *Roberts v. New England Insurance Co.*, Disney, 355, cited by the defendants.

The subsequent stipulation, by which the policy, and any sums that shall become due thereon from the company, are pledged and hypothecated to them to secure the payment of any premium on which credit may be given, and of any note or security therefor, expressly declares that "this pledge and hypothecation shall in no respect affect the provisions respecting the forfeiture of the policy," and cannot therefore enlarge those provisions.

The difference also in the form of the two notes taken by the defendants for part of the premium — that for the smallest amount and payable in the shortest time omitting the provision, which is carefully inserted in the other, of "said policy being agreed to be subject to forfeiture and to become void in case of non-payment of interest and principal of this note in compliance with the terms thereof" — accords with the construction that non-payment of the first note was not intended to have the effect of avoiding the policy.

The refusal of the assured to pay that note after it had become due, accompanied by the statement that "he would not have any thing more to do with the company, and abandoned the whole thing," does not appear to have been assented to by the company; for the company continued to hold the notes, and the assured, to hold the policy.

The defendants, having admitted the death of the assured, and due notice and proof thereof, and having failed to show that the policy was forfeited, canceled, or in any way avoided or determined before his death, are liable to his administratrix in this action.

Judgment for the plaintiff.

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PROVIDENCE INSTITUTION FOR SAVINGS AND JEWELL v. CITY OF BOSTON.

(101 Mass. 575.)

Constitutional law — construction of statute — taxation of bank shares.

By the statute of June, 1868, chapter 349, of Massachusetts, entitled "An act concerning the taxing of bank shares," it was provided that the shares in national banks owned by non-residents of the commonwealth shall be assessed to the owners thereof in the cities or towns where the banks are located; that the rate of taxation shall be the same as on other moneyed capital; that the value of such shares shall be omitted from the valuation upon which the rate is to be based, and that the act shall "apply to taxes assessed and collected for the present year in the same manner and to the same effect as if it had been in force on the first day of May." *Held*, that the act was not unconstitutional, either as being in violation of the act of congress of 1864, chapter 106, section 47, and 1868, chapter 7, or as levying a tax in a disproportional manner, or as being retrospective in its operation.

ACTION to recover the amount of taxes paid under protest. The taxes were assessed by the assessors of Boston, under the statute of 1868, chapter 349, on shares owned by the plaintiffs, in the National Revere Bank, which was established at Boston under United States statute of 1864, chapter 106. One of the plaintiffs was a corporation of Rhode Island, the other was a citizen of Connecticut. Several of the provisions of the statute of 1868, chapter 349, are referred to in the opinion. It was also provided by the act, that it should "apply to taxes assessed and collected for the present year in the same manner and to the same effect as if it had been in force on the first day of May."

B. F. Thomas, for plaintiffs.

1. The shares in a bank are personal property, and follow the person of the owner. *McCulloch v. Maryland*, 4 Wheat. 316, 437; *Utica v. Churchill*, 33 N. Y. 233.

2. The tax is disproportional on account of the mode of valuation. *Oliver v. Washington Mills*, 11 Allen, 268, 275; *Commonwealth v. People's Savings Bank*, 5 id. 428, 431; *Portland Bank v. Apthorp*, 12 Mass. 252, 255.

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3. The statute of 1868, chapter 349, is retrospective in its operation. Cases above; *Commonwealth v. Provident Institution for Savings*, 12 Allen, 313.

4. The statute is unconstitutional because it conflicts with the constitution of the United States, which provides that "citizens of each State shall be entitled to all privileges and immunities of citizens of the several States." See also *Corfield v. Coryell*, 4 Wash. C. C. 380; *Crandall v. State*, 10 Conn. 343; *Campbell v. Morris*, 3 Har. & McHen. 534, 535.

C. Allen, Attorney-General, and *C. H. Hill*, for defendants.

AMES, J. By the terms of the act of congress of June 30, 1864 (U. S. Stat. 1864, ch. 106), under which the national banks have come into existence, all the shares in each of said banks are made taxable in the place in which the bank is "located," without any regard whatever to the legal domicil of the shareholders respectively. This provision forms a part of the organic law under which every such bank has its being, and under which the stockholders contribute to its capital. This court has recently decided that the word "place," as used in the statute, means the State within which the bank is located. *Austin v. Aldermen of Boston*, 14 Allen, 359. And the subsequent amendatory act of congress of February 10, 1868 (U. S. Stat. 1868, ch. 7), uses the following language: The words "place where the bank is located and not elsewhere" shall be construed and held to mean the State within which the bank is located; and the legislature of each State may determine and direct the manner and place of taxing all the shares of national banks located within said State, subject to the restriction that the taxation shall not be at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of such State; *and provided, always*, that the shares of any national bank owned by non-residents of any State shall be taxed in the city or town where said bank is located, and not elsewhere." The legislature of this commonwealth, by the statute of 1868, chapter 349, passed June 11th of that year, entitled "An act concerning the taxing of bank shares," has undertaken to determine and direct the manner in which all the shares of stock in banks, whether of issue or not, existing by authority of the United States, shall be taxed. The act provides, among other things, that such shares owned by non-residents of this

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commonwealth shall be assessed to the owners thereof in the cities or towns where such banks are located, and not elsewhere; that the tax shall be a lien on their shares; that the value of such shares shall be omitted from the valuation upon which the rate is to be based; and that the proceeds of the tax on such shares, when collected, shall be paid over by the treasurer of the town or city to the State treasurer. The plaintiffs insist that this statute, so far as it applies to non-resident stockholders, is one which the legislature had no right to enact; that the tax assessed under it upon such stockholders is invalid; and that the lien it assumes to create upon the stock cannot be enforced.

The counsel for the plaintiffs insists that three "landmarks" have been established in this broad field of inquiry, namely, that the shares of the stockholders of the national banks are distinct subjects of taxation; that they may be assessed and taxed without deducting from their valuation that portion of the corporate capital invested in the bonds of the United States; and last, and most important of all, for the purposes of this inquiry, that, the banks being agencies of the general government in the execution of its powers and functions, the States have no power to tax their capital except under the permission of congress. It is also established by statute that the shares are taxable in the place (that is to say, the State) where the bank is located, and not elsewhere; that the legislature of each State may determine and direct the manner and place within such State of taxing such shares (with a restriction against oppressive and hostile taxation); and that, in the case of shares belonging to persons not residing within the State, the place of taxation shall be the city or town in which the bank is located, and not elsewhere. A citizen of Connecticut or Rhode Island, therefore, owning shares in a national bank in Massachusetts, is not to be taxed for them in Connecticut or Rhode Island. They can only be taxed in Massachusetts: a provision which relieves him of all danger of being twice taxed for the same property. *Flint v. Aldermen of Boston*, 99 Mass. 141. The acts of congress in regard to such shares belonging to non-resident stockholders apparently are intended to annul, as to them, the general rule that personal property follows the person, and has no locality other than the domicil of the owner, and to attach to such shares, for some purposes, and to some extent, the local character and fixity of real estate. They are proper subjects of taxation in the town where the bank in question is located; and

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the legislature of the commonwealth (as the above-quoted act of congress expressly provides that it may) has, by the statute in question, determined and directed the manner in which they shall be taxed.

If the statute of 1868, chapter 349, is to be interpreted as providing for the imposition of an excise, in the proper sense of that term, and as distinguished from a tax, it would be liable to all the objections so fully pointed out in the recent case of *Oliver v. Washington Mills*, 11 Allen, 268, and could not be sustained. But the plaintiffs do not claim that it was intended to provide for an excise, in the proper sense of that term. On the contrary, they insist that it is intended to authorize a tax, and not an excise; that the act bears the title of "An act concerning the taxation of bank shares;" that "tax," and in no case "duty" or "excise," is the term used throughout the statute; that the provisions for the assessment and collection are appropriate to a tax rather than to a duty or excise, and are assimilated to the existing provisions of law for the assessment and collection of taxes on similar property; that the rate of taxation is required to be the same as on other moneyed capital; that the same form of expression is used in the statute and in the acts of congress above cited, showing that a tax on property, and not a duty or excise on the franchise, was intended to be permitted by congress and imposed by the State; and that the statute has not been so framed that it could be held valid either as tax or an excise, whichever its true nature might be. On the assumption, then, that this argument on the part of the plaintiffs is well founded, and that the true construction of the statute is that it is intended for taxation, and not for an excise or duty, can it be maintained as a valid exercise of power on the part of the legislature?

The objection that it conflicts with the restrictions expressly provided for by the two acts of congress is one which meets us at the threshold of the inquiry, and may very properly be considered first. The power of the State to tax the shares is subject to the restriction that the tax shall not be "at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of the State." We think that this clause was obviously intended to preclude the possibility that property of that description should be singled out for special and peculiar taxation. Its operation would be, to prevent oppressive and hostile discriminations unfavorable to the banks. A State, if there were no such restrictions, might so arrange its method of taxation as substantially to expel

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the national banks from its limits. It must be assumed that this system of banking was devised by the national legislature for national purposes, as an agency of the government in the exercise of its powers and functions, and that for public reasons it was intended that it should be general and uniform throughout the country. It might well seem reasonable to congress to take some precaution that the banks in each State should be taxed only at the same rate, and generally in the same manner, as the moneyed capital of individual citizens is taxed in the same State. The language of the act of congress does not require the strict, literal and narrow interpretation that might be proper in the construction of a penal statute. It means, merely, as we think, that such shares shall be taxed upon a general system and in compliance with a set of rules and principles applied alike throughout the State to the taxation of all moneyed capital. It means, that the rate upon a thousand dollars, invested in such a bank, shall be the same as the rate upon a like sum put out at interest on good security; that, as far as mere taxation is concerned, the owner of the one investment shall fare neither better nor worse than the ascertained owner of the other; that banks are not to be oppressed or incommoded, nor their operations as agencies of the general government to be prevented or impeded by invidious and unfavorable rates, as compared with other property of the same general kind in the same place. A strictly literal construction of the clause would lead to such results that practically it would be a matter of almost insuperable difficulty to lay any legal tax at all upon that form of investment. If the words mean that the rate is to be the lowest that is assessed upon any moneyed capital in any part of the commonwealth, one result would be, that the owners of bond stock would be assessed, in Boston for example, at less than the rate of taxation on other moneyed capital, or other property generally, owned by other residents of the same city. It may be assumed that generally the taxation in large cities will be at a higher rate than in rural and small farming towns. There would not only be one rate on bank stock, and another and higher rate on other property, but the assessors of Boston, before fixing upon the rate for bank stock, must inform themselves what is the lowest rate of taxation on moneyed capital in any one of the very many municipal bodies into which this State is subdivided. When they have obtained that information, on this construction of the act of congress, they will have

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ascertained the maximum rate proper to be observed in the taxation of bank stock. Then suppose that Boston, on its being ascertained that the tax on moneyed capital in some small town in the county of Berkshire, or in the county of Franklin, has been fixed at five cents on the \$100 of valuation, should adopt that same rate for the taxation of bank stock; and suppose it should happen that the assessors of the city of Worcester, for example, in order to be certain not to endanger the validity of their tax by adopting too high a rate, should take the precaution to fix their rate upon bank stock at four cents and nine mills on the \$100, is the Boston tax to be thereby rendered illegal and void for being in conflict with the restriction contained in the act of congress of February 10, 1868? Why not, if the lowest rate on any moneyed capital is the only legal rate?

Is the tax on bank stock throughout the commonwealth to be determined and absolutely controlled by the decision of some small country village, in which there happens to be no bank, and in which the municipal wants and expenses are slight and insignificant? Yet the literal construction of the words "at a rate no greater than is assessed upon *any* other moneyed capital in the hands of individual citizens of the State" would lead to precisely this result. It is impossible to believe that such was the purpose of the act, or that such would be a reasonable and fair interpretation of its meaning. In our judgment, it satisfies the meaning of the restriction, if the rate upon bank shares is the same as the rate upon moneyed capital in the hands of individual citizens in the town or city where the bank is located.

Another objection, which is the one principally urged in the argument, is that the tax in controversy is not proportional. If this objection should prove to be well taken, the tax is illegal and void. It is not in the power of congress to authorize the legislature to adopt a system which fails in so important and vital a particular. But in what way does this alleged want of fair proportion manifest itself, and in what does it consist? If we compare the case of the non-resident stockholder with that of those resident in the town where the bank is established, we find that they pay at exactly the same rate on their shares. If we compare his case with that of individuals, citizens of the same place, owning other moneyed capital, we find that they also pay at the same rate on their respective valuations. Suppose it to be true that they all pay at a higher rate

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than would be charged if the shares belonging to non-residents were included in the valuations, yet, as they all pay at one uniform rate, there is no disproportion as among themselves. The rate in one town may be very different from the rate in the adjoining town; but it is not necessary, in order to meet the requirement that taxes shall be proportional, that the rate shall be identical in all the very great number of municipal corporations throughout the State. Each town determines for itself what amount of expenditure its wants require, or its valuation and local circumstances will justify; and, of course, the rates differ very widely in different places, yet they have never been called in question as not being proportional, on account of discrepancies of that nature. We do not understand that there is any complaint that one set or class of stockholders in banks is taxed on a different system from the rest; or that there is any want of due proportion among the stockholders, as compared with each other, or with other individuals owning moneyed capital. The proportion, on which we understand the plaintiffs to insist as the only constitutional and legal basis on which taxes can be assessed, is that which the whole amount to be raised by taxation, under the description of State, county and municipal taxes, bears to the entire amount of all the property taxable within the commonwealth. How stands the case in view of this objection?

If our statute of 1868, chapter 349, had simply provided that the tax on bank shares belonging to persons not residing within the State should be paid into the treasury of the town or city where the bank is, and should make a part of the funds of such town or city; in other words, if such shares were included in the valuation, and taxed as the real estate of non-resident owners is taxed, the case would present no difficulty, or, rather, the case would not have arisen. But the statute requires that the value of such shares shall be omitted from the valuation upon which the rate is to be based; and also that the taxes upon such shares, though paid in the first instance to the treasurer of the town or city where the bank is, shall be accounted for by him to the State treasurer, and appropriated to the use of the commonwealth. The effect of the statute, then, will be that the whole amount of the State, county and town taxes (so far as they affect property and not polls) is levied upon the whole amount of taxable property in the State, except only the shares of non-resident stockholders in the national banks established within the State. That is to say, the whole of the property tax,

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falling within that qualification, is imposed upon only a part of the taxable property of the commonwealth; a large part, undoubtedly, but confessedly only a part. The plaintiffs claim that the rate of taxation is higher and the tax larger, to each individual tax payer, than they would be if literally the whole of the taxable property were charged with the whole of the tax.

As we understand the argument in behalf of the plaintiffs it may be illustrated in this manner: Suppose the whole amount of the property, which, by the terms of the statute, is to be omitted from the general valuation forming the basis of taxation, to be sufficiently large for its omission to diminish that valuation to such an extent that, in order to raise the whole amount of the taxes, it should become necessary to increase the rate of taxation from four cents on each \$100 to five cents. Of course these figures are here taken arbitrarily, merely for the purpose of illustration, and without any attempt to approximate to the exact state of the facts. Assuming these figures, we should have the taxes upon property included in the valuation apparently twenty-five per cent higher than they would be under a system requiring the whole of the taxable property to pay the whole of the property tax. This same rate, made by the operation of the statute, as the plaintiffs insist, to stand at twenty-five per cent above the true constitutional ratio, and its true and legal proportions, is then imposed by the statute upon the shares belonging to non-resident owners. And the plaintiffs insist that, whatever may be the state of things among the stockholders as compared with each other, the rate and the amount both are not in that ratio to the taxable property which alone is recognized by the constitution as the true and just proportion.

It is quite apparent that this objection, if well founded, is very far from being peculiarly applicable to the case of non-resident owners of bank stock. If the fact that the whole amount of the property taxes is levied upon less than the whole amount of taxable property is a valid objection, it is sufficient to vitiate the whole tax. The owners of bank stock, moneyed capital, or, in fact, of any other description of taxable property included in the valuation, would apparently have as much reason to complain of the disproportion as the non-resident owners of bank stock. If the principle of assessment should prove to be erroneous and vicious, and prohibited by the terms of the constitution, the tax is all wrong.

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from beginning to end, and cannot be enforced against owners of bank stock, whether resident or not resident in the State, nor in fact against any owners of property whatever.

It is true that, under the operation of the statute, a part only of the taxable property of the commonwealth is made to pay the whole of the county tax, the city and town tax, and also the whole amount of what is annually voted by the legislature specifically as the State tax, so far as these three descriptions of tax are assessed upon property and not upon polls. The money obtained from the assessment of bank stock belonging to non-resident owners does not make any part of either one of these three descriptions of tax. But, although not known as the State tax *eo nomine*, it is nevertheless a tax for the use and benefit of the State. It goes into the public treasury, and makes a part of the annual ways and means of the State. The effect of the statute, if carried out, would be to furnish the commonwealth with a regular source of income capable of making a valuable addition to the public revenue, varying perhaps somewhat from year to year, but not subject to any violent or sudden fluctuations, and generally admitting of a reasonably close estimate in advance. We are bound judicially to know the fact that the large amounts annually appropriated by the legislature for the payment of the expenses of the commonwealth are mainly supplied by the imposition of the State tax. We are bound also to assume that, in determining the amount of that State tax, the legislature takes into consideration all the sources of income, from any quarter, which the State has at its command, including among them the tax provided for by this statute, and that the general State tax annually voted is intended to cover deficiencies of revenue, and to provide the necessary ways and means for the varying exigencies of the public service. The acts of congress have made certain property taxable here, which without these acts might not be so taxable. They have also permitted the legislature to determine and direct the manner of such taxation. This it has undertaken to do by a statute which provides that the new taxation shall be so managed as to inure wholly to the benefit of the State treasury, and not be applied to merely local and municipal purposes. The statute assumes that, to the stockholder not residing within the State, the appropriation of such a tax is a matter of no interest or importance. It does not concern him, so long as the amount is ascertained on the same principles and the tax is assessed at the

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same rate as it would be if he resided in the city or town where the bank is established.

We do not understand the plaintiffs to deny that their shares are proper subjects of taxation in Boston, or to complain that there is any disproportion in the taxation of resident and non-resident shareholders in the same place, as compared with each other. The objection is, that by the operation of the statute they are made taxable at a higher rate, and so for a larger amount, than they would be if they were included in the valuation upon which the rate is to depend. Is this complaint well founded? It is to be remembered that whatever amount may be added to the public revenue by the operation of the statute diminishes to exactly the same extent the amount necessary to be raised by the State, properly and technically so called. The annual resolve for the assessment of a State tax is what, in parliamentary language, is usually called a "deficiency bill." Suppose that, after considering all sources of income other than taxation, the legislature should find that the sum of \$1,200,000 is needed to cover the public expenditures of the State, and that the tax on bank shares belonging to non-residents, and provided for in the terms of the statute, would produce the sum of \$200,000 annually? And here it may be repeated that these figures are assumed arbitrarily, and merely as illustrative of the argument. Upon these figures a tax of \$1,000,000 would supply the deficiency. But, if the statute were to be repealed or pronounced unconstitutional and void, and the law so far changed that the bank shares belonging to non-residents should be included in the municipal valuations, and taxed as other property of the same kind is taxed, the State would lose from its annual revenue the sum of \$200,000. The valuations which form the basis of taxation would be increased by the addition of property producing \$200,000 in taxes annually. The county and municipal taxes, not being increased, would be assessed upon a larger amount, and of course at a lower rate; but the State tax, on the other hand, would be raised from \$1,000,000 to \$1,200,000. The general result would be, that the tax payers would pay exactly what they did before, with not the slightest change of rate or proportion. In either mode of taxation, the taxable property would pay into the treasury of the State exactly the same sum, namely, \$1,200,000. The non-resident stockholders, as a class, do not appear, then, to have any cause to complain that the tax upon

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them as such, under our statute, is not proportional; and we find nothing in the agreed facts that distinguishes these plaintiffs from other non-resident owners generally.

There is a provision in the statute, that, in assessing such shares, there shall be a deduction of a proportionate part of the value of the real estate belonging to the bank. To that extent the non-resident stockholder is privileged and favored, as there seems to be no law requiring or permitting any such allowance in favor of stockholders residing in the State. This disproportion was not alluded to in the argument, and no importance, as we suppose, was intended to be attached to it. It certainly is not one of which these plaintiffs can reasonably complain.

The conclusion, then, at which we arrived is that the statute of 1868, chapter 349, does not transcend or conflict with the limitations expressly set forth in the acts of congress; that, practically, it produces no appreciable disproportion among tax payers as compared with each other; that the omission of the shares of non-residents from the town valuations produces no actual want of due proportion, for the reason that the general result of the taxation, supposing the statute to be held valid, is substantially identical, to each tax payer, with what it would be if the shares of non-residents were included in those valuations, and taxed in the same manner in all respects as the real estate of non-resident owners is taxed; and that, although in one mode of proceeding the sum total of the valuations is less than in the other, yet the aggregate of the amount to be raised under the heads of county, municipal and State taxes is diminished in exactly the same proportion.

As to the objection that it is retrospective in its operation, it seems to be enough to say that, under the acts of congress, the property was certainly taxable in such lawful manner as the legislature of the commonwealth should direct. Whoever, then, on the first day of May, 1868, held such property knew, or was bound to know, that it was taxable like other moneyed capital as of that day, in such manner as by law might be provided.

We do not find, in the various objections taken on behalf of the plaintiffs, and so ably and forcibly urged by their learned counsel, any thing that convinces us that the statute ought to be pronounced unconstitutional, or that the tax imposed in pursuance of it is unlawful and void. And according to the terms of the agreement there must be, in each case,

Judgment for the defendant.

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(108 Mass. 24.)

Conveyance of land — Relief from misrepresentations.

The defendant made a conveyance of land to the plaintiff not actually including a certain lot of seventeen acres, which defendant had represented, and plaintiff had been led to believe, to be covered by the deed. By a proviso in the deed plaintiff assumed the burden of maintaining a line fence being induced to consent to the proviso by false representations of the defendant in regard to the amount of fence which his neighbors would be obliged to maintain. Part of the purchase-money for the land was paid in government bonds, the defendant agreeing to take them at par and pay the interest and premium, and there was a considerable sum due the plaintiff thereon. By a bill in equity the plaintiff prayed that the defendant be compelled to convey the additional seventeen acres, to release plaintiff from the proviso and to pay the amount due on the bonds. *Held*, that the conveyance prayed for could not be decreed; that the remedy relating to the proviso and to the bonds was adequate at law; and that, as the plaintiff did not offer to rescind the whole contract, there was no remedy in equity.

BILL in equity for relief from alleged injustice growing out of the conveyance of land. The case was reserved by the chief justice for the consideration of the full court.

THE facts are set forth in the opinion.

W. H. Swift (*S. W. Bowerman* with him), for plaintiff.

M. Wilcox (*W. T. Filley* with him), for defendant.

WELLS, J. The plaintiff purchased certain lots of land of the defendant, received a deed, and paid the whole amount of the purchase-money. This suit is brought for relief or redress in several particulars, dissimilar in character, but all connected with the alleged oral contract of purchase. He complains: *First*, that a proviso was inserted in his deed, imposing upon him the burden of supporting the whole fence upon the south line of the land conveyed; and that he was induced to assent to its insertion upon the consideration, and false representation of the defendant, that the whole

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fence upon the east side of said land was to be maintained by the adjoining proprietor, Patrick McDaniels, by virtue of a written obligation to that effect, and that the plaintiff would be relieved from all liability to maintain any fence upon that side; as well as by certain other false representations of the defendant in relation thereto. *Second*, that he delivered to the defendant, in part payment of said purchase-money, three bonds of the United States, of \$1,000 each, upon the agreement of the defendant that he would allow the full market value of the same, including premium and accrued interest at the time of the transfer thereof; and that the defendant refuses to allow and pay him the value of such premium and interest, amounting together to the sum of \$315, that sum being in excess of the whole purchase-money due to the defendant. *Third*, that, during the negotiations for the sale and purchase of said lands, the defendant pointed out the south-east corner of the premises proposed for sale, and represented that the land of the adjoining proprietor, McDaniels, extended to that point, and that the southerly line of the land sold would extend from the same corner to a point on the highway near a bridge; that the deed was accordingly written and accepted, describing the land as bounded on the south by a line running from the south-west corner of land of said McDaniels, at right angles to the westerly line of said McDaniels, to the highway, the defendant representing said line to be the same line previously pointed out by him to the plaintiff, and that it would strike the highway within one rod of said bridge; whereas in fact the land of said McDaniels did not extend so far as to the south-east corner of the defendant's land, as pointed out by him, and the south line, running at right angles therefrom to the highway, did not strike the same within one rod of said bridge; and the deed so written and accepted did not include a considerable part of the land so offered and represented to be sold, and intended and understood by the plaintiff to have been purchased by him; the part so excluded consisting of about seventeen acres of land, comprising the greater part of the meadow land in the tract as pointed out by the defendant.

The plaintiff, by this bill, does not seek to rescind the contract and conveyance; and does not offer to re-convey or release to the defendant the land conveyed; nor pray that he may be allowed to do so, and recover back the purchase-money paid and bonds delivered in payment. The relief prayed for is, that the defendant may

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be required to convey to the plaintiff the portion of the tract which was so by fraud or mistake, omitted from the conveyance already made to release the plaintiff from the proviso in his deed in regard to the fence; and to pay to the plaintiff the aforesaid amount of premium and interest upon said bonds.

The argument of the plaintiff is addressed mainly to the question of the equity jurisdiction of this court in cases of fraud or mistake like that alleged in the present suit. There can be no doubt upon that point. There is no ground upon which jurisdiction in equity is so readily entertained and freely exercised. It is given to this court without restriction, if the parties have not a plain, adequate and complete remedy at law. Gen. Stat., ch. 113, § 2. Having jurisdiction, the question is as to the appropriate remedy. Jurisdiction in equity is often maintained, even when there is a remedy at law, for the sake of the greater facility it affords for adapting the proper relief to the peculiar necessities of each case. If the party suing is entitled to no relief other than that which may be had in an action at law, he is remitted to his remedy in that form. Even in a proper case for an appeal to equity, the remedy must be sought in reference to certain recognized rules and principles of chancery jurisprudence, and is often restricted by provisions of positive law. It is not administered arbitrarily. It must flow out of and accord with the agreements and obligations of the parties, and be adapted to the condition of facts to which it is to be applied.

In the present case, the principal ground of action is the fraud or mistake by which an important part of the subject-matter of the alleged contract of sale and purchase was omitted from the deed of conveyance. If the allegations of the bill should be sustained by the proofs, they would show a clear right to have a rescission of the contract; and, upon reconveyance of the land covered by the deed, to have restoration of the bonds and money that were delivered in payment. But this relief the plaintiff does not seek; and his bill contains no offer to reconvey, without which he cannot have such relief. The prayer of the bill, and its sole purpose in this particular, is, that the defendant may be compelled to convey to the plaintiff the seventeen acres of land which he alleges were included in the oral contract of sale, or represented by the defendant to be so included, but omitted from the deed.

If the case stood merely upon the oral contract of sale, with a

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conveyance of part and a neglect or refusal to convey another part of the land which was the subject of the alleged contract, we do not think it would be contended that the plaintiff could compel a conveyance of the other land, against a party denying the contract and setting up the statute of frauds. Courts are bound to regard that statute in equity as well as at law. The only remedy in equity in such case would be by a rescission of the entire contract, in which the aid of the court could be obtained, if necessary, upon proper grounds.

There has been no part performance here, such as, according to the general practice in courts of equity, would be held to take the case out of the statute of frauds.

1. Payment of the whole consideration is not sufficient for that purpose. *Hughes v. Morris*, 2 De Gex, Macon & Gord. 356; *Thompson v. Gould*, 20 Pick. 134, 138; Browne on Stat. of Frauds, § 461; Fry on Spec. Perf., § 403; *Dale v. Hamilton*, 5 Hare, 369; *Clinan v. Cooke*, 1 Sch. & Lef. 22, 41; *Allen's Estate*, 1 W. & S. 383; *Purcell v. Miner*, 4 Wall. 513.

2. Possession by the purchaser, under such a deed as was given to the plaintiff, is possession according to the title thereby conveyed, and is not such a possession as to afford ground for enforcing an alleged oral agreement to convey other land, claimed to have been embraced in the same oral agreement with that conveyed. *Moale v. Buchanan*, 11 Gill. & Johns. 314. The plaintiff does not appear to have been let into actual possession of the seventeen acres, nor to have been induced to do any acts thereon, as owner under his supposed rights as purchaser.

3. The conveyance of a portion of the land is neither a part performance, nor is it a recognition of the alleged oral contract, so far as it relates to the remaining land not included in the deed. On the contrary, it is in distinct disregard and implied disavowal of such a contract. The deed was given and accepted in execution of the entire contract of sale. Its terms are in literal conformity with the agreement as made. The plaintiff concedes that the southern boundary was stipulated to be described as it is written in the deed, to wit, running from the south-westerly corner of land of McDaniels, and at right angles with his westerly line, to the highway.

But, the plaintiff claims that he in fact purchased the whole of a certain tract of land which included the seventeen acres now in dispute; that the description of the boundaries, as agreed upon and

inserted in the deed, was so agreed on and inserted upon the representation of the defendant and the belief of the plaintiff that it did include said seventeen acres; and that the failure of the deed to embrace and convey that part of the land was occasioned either by the mutual mistake of the parties as to the position of the south-west corner of land of McDaniels, or else by the misrepresentation, deceit and fraud of the defendant in relation thereto. In either alternative, the plaintiff contends that he is entitled to a reformation of the deed, to make it conform to the sale actually contracted by the parties.

Such a reformation not only requires a description of the subject-matter of the sale, different from the express terms of the oral contract, but would enlarge the effect and operation of the deed, as a conveyance. It involves the transfer of the legal title to land not covered by the deed already given. It requires a new deed to be executed and delivered by the defendant to the plaintiff. Whether that deed shall embrace the entire subject of the alleged contract of purchase, with a correct description to make it conform to facts and abuttals as they were represented to be, or merely convey the seventeen acres omitted from the deed already given, the order for the execution will enforce the specific performance of a contract for the sale of lands, for which there exists no memorandum, note or other evidence in writing signed by the party to be charged therewith. As to the seventeen acres in dispute, the obligation to convey them rests solely in the oral contract. The defendant denies any contract which includes them. The plaintiff seeks to establish such a contract by parol evidence, and enforce it. The deed itself furnishes no means of making the correction sought for, and no evidence of the contract relied on for this purpose; nor is it in any sense an acknowledgment of the substance of the alleged oral agreement.

The power to rectify deeds and other written instruments undoubtedly exists in this court, under the clauses of the statute giving equity jurisdiction in cases of fraud, accident and mistake, or the clause giving it generally where there is no adequate remedy at law. It has been exercised in several cases. *Canedy v. Marcy*, 13 Gray, 373; *Metcalf v. Putnam*, 9 Allen, 97. But the power will be exercised in subordination to other fixed principles of law, and especially to statute provisions. If the rules restricting the administration of judicial remedies, which are prescribed by the statute of frauds, were to be disregarded in this branch of equity procedure, it would

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open the door to all the forms of fraud which that statute was intended to prevent. The statute is not a mere rule of evidence, but a limitation of judicial authority to afford a remedy. It requires that contracts for the sale of lands, in order to be enforced by judicial proceedings, must be substantiated by some writing. This provision of law cannot be dispensed with merely for the reason that the want of such writing was occasioned by accident, mistake or fraudulent representations, unless some other ingredient enters into the case to give rise to equities, stronger than those which stand upon the oral contract alone, which estop the other party from setting up the statute.

It makes no difference whether the want of a writing was accidental or intentional, by way of refusal or by reason of mutual mistake; nor that there were false representations and a pretense of conveying the land, but a fraudulent evasion, by means whereof there was no conveyance in fact, and no proper written evidence of the agreement to convey. From the oral agreement there can be derived no legal right, either to have performance of its stipulations or written evidence of its terms. So long, therefore, as the effect of the fraud or mistake extends no further than to prevent the execution, or withhold from the other party written evidence of the agreement, it does not furnish sufficient ground for the court to disregard the statute of frauds, and enter into the investigation of the oral agreement for the purpose of enforcing it. And we do not see that the present case stands otherwise in this respect than it would if there had been no conveyance of any part of the land. As already shown, that conveyance was not in execution or recognition of the contract which the plaintiff seeks, by this bill, to enforce; and does not furnish any reason for taking the case out of the statute, on the ground of part performance. Indeed, the rule seems to be that no part performance, by the party sought to be charged will take an agreement out of the statute of frauds, except in those cases where the statute itself provides for such effect. It is part performance by the party seeking to enforce, and not by the other party, to which courts of equity look, in giving relief from the statute. *Caton v. Caton*, Law Rep., 1 Ch. 137; S. C., Law Rep., 2 H. L. 127; *Mundy v. Jolliffe*, 5 Myl. & Cr. 167; *Buckmaster v. Harrop*, 7 Ves. 369; Browne on Stat. of Frauds, § 453.

When the proposed reformation of an instrument involves the specific enforcement of an oral agreement within the statute of frauds; or when the term sought to be added would so modify the

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instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the statute of frauds is a sufficient answer to such a proceeding, unless the plea of the statute can be met by some ground of estoppel, to deprive the party of the right to set up that defense. *Jordan v. Sawkins*, 1 Ves. Jr. 402; *Osborn v. Phelps*, 19 Conn. 63; *Clinan v. Cooke*, 1 Sch. & Lef. 22.

The fact that the omission or defect in the writing, by reason of which it failed to convey the land or express the obligation which it is sought to make it convey or express, was occasioned by mistake, or by deceit and fraud, will not alone constitute such an estoppel. There must concur, also, some change in the condition or position of the party seeking relief, by reason of being induced to enter upon the execution of the agreement, or to do acts upon the faith of it as if it were executed, with the knowledge and acquiescence of the other party, either express or implied, for which he would be left without redress if the agreement were to be defeated.

Upon a somewhat extended examination of the decisions in regard to the effect of the statute of frauds upon the right to have equitable relief where the writing is defective, although many of them, where relief has been granted, hardly come within this definition in the apparent character of the particular facts upon which they were decided, yet we are satisfied that this principle of discrimination is the only one which can give consistency to the great mass of authorities upon this subject.

The case of *Smith v. Underdunck*, 1 Sandf. Ch. 579, is nearly like the present in its facts; and the opinion of the assistant vice-chancellor would seem to sustain the right of the plaintiff here. There was no fraud in the preparation of the deed. The judgment was based mainly upon the ground of part performance. It was held to be sufficient to take the case out of the statute, that the plaintiff had been led into possession as purchaser; and the opinion indicates that possession, under and in accordance with a deed of part, would be a sufficient possession of the whole for the purpose of requiring a deed of the remainder. But the decision rests upon the fact of possession by the plaintiff of the entire premises, including the part for which the bill was brought. The case arose upon demurrer to the bill, which, of course, admitted the contract and

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the alleged possession of the whole tract. The question of the statute of frauds did not arise therefore.

That the purchaser has been let into possession, in pursuance of a parol agreement, has been very generally recognized as sufficient to take it out of the statute. The reasoning by which this result was reached is far from satisfactory; and even where the rule prevails, there are frequent intimations that it is regarded as trenching too closely upon the spirit as well as the letter of the statute. If it were now open to settle the rule anew, we cannot doubt that it would be limited to possession accompanied with or followed by such change of position of the purchaser as would subject him to loss for which he could not otherwise have adequate compensation or other redress; and that mere change of possession would not be held to take a case out of the statute. However it may be elsewhere, we are disposed to hold the rule to be so in Massachusetts.

Previously to the statutes of 1855, chapter 194, and 1856, chapter 38 (Gen. Stats., ch. 113, § 2), the power of the court to direct specific performance was confined to written contracts. R. S., ch. 74, § 8. That power was held to be strictly limited to contracts in which the whole obligation to be enforced was expressed in the writing. *Dwight v. Pomeroy*, 17 Mass. 303; *Brooks v. Wheelock*, 11 Pick. 439; *Leach v. Leach*, 18 id. 68; *Buck v. Dowley*, 16 Gray, 555; *Park v. Johnson*, 4 Allen, 259. The provision conferring that power specifically in case of written contracts is still retained in the general statutes, chapter 113, section 2. If the subsequent clauses, conferring jurisdiction generally, are to be construed, as we think they are, to extend the power of the court, so as to give relief by way of specific performance, either of contracts wholly unwritten, or of stipulations proved by parol and incorporated into a contract by judicial rectification of a written instrument, as in *Metcalf v. Putnam*, 9 Allen, 97, still that power ought to be exercised with constant reference and in subordination to the condition that "the party asking relief has not a plain, adequate and complete remedy at common law," which accompanied each enlargement of the equity power of the court, and which prefaces and closes the enumeration of those powers in the general statutes. The force of this consideration is not lessened when applied to agreements within the statute of frauds.

Mere possession of land does not expose the party to loss or danger of loss without redress at law. The parol agreement of sale

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and purchase, with permission to enter, though not to be enforced as a valid contract of sale, will constitute such a license as will protect the party from liability for acts done before the license is revoked, and for all acts necessary to enable him to remove himself and his property from the premises after such revocation. If possession be taken without such permission, express or implied, it is no foundation for relief in equity, according to any of the authorities. The argument, for the admission of parol evidence to prove an agreement within the statute of frauds in order to enforce it in equity, drawn from the admissibility of such evidence to maintain a defense, either at law or in equity, seems to be based upon a misconception of the purport and force of the statute, which reaches no farther than to deny the right of action to enforce such agreements.

In this commonwealth the possession of land by a purchaser is not even notice to a third party of an unrecorded deed. The whole spirit of our laws in respect to real estate is against the policy of enabling parties to acquire or confer title, either legal or equitable, by mere parol and delivery of possession. The possession of the plaintiff, therefore, even if it extended to the tract in dispute, is not sufficient to entitle him to relief against the statute.

The principle on which courts of equity rectify an instrument, so as to enlarge its operation, or to convey or enforce rights not found in the writing itself, and make it conform to the agreement as proved by parol evidence, on the ground of an omission, by mutual mistake, in the reduction of the agreement to writing, is, as we understand it, that in equity the previous oral agreement is held to subsist as a binding contract, notwithstanding the attempt to put it in writing; and upon clear proof of its terms the court compel the incorporation of the omitted clause, or the modification of that which is inserted, so that the whole agreement, as actually intended to be made, shall be truly expressed and executed. *Hunt v. Rousmaniere*, 1 Pet. 1; *Oliver v. Mutual Commercial Insurance Co.*, 2 Curtis' C. C. 277. But, when the omitted term or obligation is within the statute of frauds, there is no valid agreement which the court is authorized to enforce outside of the writing. In such case relief may be had against the enforcement of the contract as written, or the assertion of rights acquired under it contrary to the terms and intent of the real agreement of the parties. Such relief may be given as well upon the suit of a plaintiff seeking to have a written contract, or some of its terms, set aside, annulled or

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restricted, as to a defendant resisting its specific performance. *Canedy v. Marcy*, 13 Gray, 373; *Gillespie v. Moon*, 2 Johns. Ch. 585; *Keisselbrack v. Livingston*, 4 id. 148.

Relief in this form, although procured by parol evidence of an agreement differing from the written contract, with proof that the difference was the result of accident or mistake, does not conflict with the provisions of the statute of frauds. That statute forbids the enforcement of certain kinds of agreement without writing; but it does not forbid the defeat or restriction of written contracts; nor the use of parol evidence for the purpose of establishing the equitable grounds therefor. The parol evidence is introduced, not to establish an oral agreement independently of the writing, but to show that the written instrument contains something contrary to or in excess of the real agreement of the parties, or does not properly express that agreement. *Higginson v. Clowes*, 15 Ves. 516; *Clowes v. Higginson*, 1 Ves. & B. 524; *Squier v. Campbell*, 1 Myl. & Cr. 459, 480.

But rectification by making the contract include obligations or subject-matter, to which its written terms will not apply, is a direct enforcement of the oral agreement, as much in conflict with the statute of frauds as if there were no writing at all. *Moale v. Buchanan*, 11 Gill. & Johns. 314; *Osborn v. Phelps*, 19 Conn. 63; *Elder v. Elder*, 1 Fairf. 80. In *Parkhurst v. Van Courtlandt*, 14 Johns. 15, 32, it is said that "where it is necessary to make out a contract in writing, no parol evidence can be admitted to supply any defects in the writing." Per THOMPSON, C. J. Such rectification, when the enlarged operation includes that which is within the statute of frauds, must be accomplished, if at all, under the other head of equity jurisdiction, namely, fraud. *Irnham v. Child*, 1 Bro. Ch. 92; 1 Story Eq., § 770 a; *Davis v. Fitton*, 2 Drury & Warren, 225; *Wilson v. Wilson*, 5 H. L. C. 40, 65; *Manser v. Back*, 6 Hare, 443; *Clarke v. Grant*, 14 Ves. 519; *Clinan v. Cook*, 1 Sch. & Lef. 22.

The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its performance, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to

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confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held, by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds. *Hawkins v. Holmes*, 1 P. W. 770; *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 274; S. C., 14 Johns. 15; Browne on St. of Frauds, § 437 *et seq.*; Fry on Spec. Perf., §§ 384–388; *Caton v. Caton*, Law Rep., 1 Ch. 137, 147; S. C., Law Rep., 2 H. L. 127. In the last-named case it is said that “the right to relief in such cases rests not merely on the contract, but on what has been done in pursuance of the contract.” Per Lord Chancellor CRANWORTH. See, also, 1 Story’s Eq., § 759. But the present case, as we have already seen, does not come within the principle of this ground of equitable relief.

Fraud, which relates only to the preparation, form and execution of the writing, is sufficient to vitiate the instrument so made. It may be set aside either in equity or at law. If it is made to include land not the subject of the actual sale, it is inoperative as to such land, and the fraud may be shown, for the purpose of defeating its recovery, in an action at law. *Walker v. Swasey*, 2 Allen, 312, and 4 id. 527; *Bartlett v. Drake*, 100 Mass. 174. It has been questioned whether any other effect can be given to such fraud than to defeat the operation of the instrument altogether; and whether a court of equity can reform by giving it a narrower operation, as modified by parol proof, in a case within the statute of frauds. *Attorney-General v. Sitwell*, 1 Y. & Col. Exch. 559. The difficulty is, that, if the fraud vitiates and defeats the instrument, then the modified agreement to be enforced must be that which is proved by parol evidence, and this seems to violate the statute. But the instrument, in such case, is not void. It is voidable only; and that not at the election of the party who committed the fraud. He is not entitled to control the extent of the effect that shall be given to his fraudulent conduct; and it is not for him to object that the fraud is availed of only to defeat the rights which he has secured by fraud, beyond what he is fairly entitled to by the terms of the real agreement between the parties. When those are separable, and the nature of the case will admit of it, the court may enforce the written contract in accordance with its terms, giving relief against the fraudulent excess, or the clause improperly inserted. Parol testimony, used to defeat a title or limit an interest acquired under a written instrument, or to convert it into a trust, does not necessarily conflict with

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the statute of frauds. It has been held that an absolute deed may, in this mode, be converted, in equity, into a mortgage. *Washburn v. Merrill*, 1 Day, 140; *Taylor v. Luther*, 2 Sumn. 228; *Jenkins v. Eldredge*, 3 Story, 181, 293; *Morris v. Nixon*, 1 How. 118; 4 Kent's Com. (6th ed.) 143. Whether this can be done in Massachusetts has not yet been decided. *Newton v. Fay*, 10 Allen, 505. But if it were to be so held, it would not be upon the ground of enforcing a parol agreement to reconvey; but upon the ground that such an agreement, together with proof that the deed was given and accepted only as security for a debt, made out a case of fraud, or trust, which would warrant a decree vacating the title of the grantee, as far as he attempted to hold contrary to the purposes of the conveyance. In such cases, the court acts upon the estate or rights acquired under the written instrument; and within the power over that instrument which is derived from the fraud or other ground of jurisdiction. But when it is sought to extend that power to interests in land not included in the instrument, and in relation to which there is no agreement in writing, the case stands differently. Fraud may vitiate the writing which is tainted by it, but it does not supply that which the statute requires. It may destroy a title or right acquired by its means, but it has no creative force. It will not confer title. In the absence of a legal contract by the agreement of the parties, it will not establish one, nor authorize the court to declare one, by its decree.

This distinction is illustrated by the analogous rule in regard to implied trusts. Gen. Sta., ch. 100, § 19. Parol evidence may charge the grantee of lands conveyed with a resulting or implied trust, which equity will enforce. But such evidence will not create a trust in lands already held by an absolute title.

A fraudulent misrepresentation, although sufficient to sustain an action for damages, cannot be converted into a contract to be enforced as such. Neither will it furnish the measure by which a written contract may be reformed. In this discussion we have assumed that there was a clear agreement between the parties, which the deed fails to carry out, and to which it might properly be made to conform, but for the obstacle in the statute of frauds.

It has been often asserted that where one, by deceit or fraudulent contrivance, prevents an agreement intended to be put in writing, from being properly written or executed, he shall not avail himself of the omission, and shall not be permitted to set up the statute of

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frauds against the proof and enforcement of the parol agreement, or of the parol stipulation improperly omitted. But in our opinion this doctrine would practically annul the statute. The tendency of the human mind, when fraud and injustice are manifest, is to strain every point to compass its defeat; and to render full redress to the party upon whom it has been practiced. *Mundy v. Jolliffe*, 5 Myl. & Cr. 167; *Taylor v. Luther*, 2 Sumn. 233. This influence has led to decisions in which the facts of the particular case were regarded more than the general considerations of public policy upon which the statute is founded and entitled to be maintained. Courts have sometimes regarded it as a matter of judicial merit to wrest from under the statute all cases in which the lineaments of fraud in any form were discernible. But the impulse of moral reprobation of deceit and fraud, however commendable in itself, is liable to mislead, if taken as the guide to judicial decrees.

We apprehend that in most instances where fraud, occasioning a failure of written evidence of an agreement, or particular stipulation, has been held to take the case out of the statute of frauds, there was some fact of prejudice to the party, or change of situation consequent upon the fraud, which was regarded as sufficient to make up the elements of an equitable estoppel. In such case the argument is transferred to the simple question of the sufficiency of the additional circumstance for that purpose. The cases most frequently referred to are those arising out of agreements for marriage settlements. In such cases the marriage, although not regarded as a part performance of the agreement for a marriage settlement, in such an irretrievable change of situation, that, if procured by artifice, upon the faith that the settlement had been, or the assurance that it would be, executed, the other party is held to make good the agreement, and not permitted to defeat it by pleading the statute. *Maxwell v. Mountacute*, Prec. in Ch. 526. Browne on St. of Frauds, §§ 441—445.

Another class of cases are those where a party acquires property by conveyance or devise secured to himself under assurances that he will transfer the property to, or hold and appropriate it for, the use and benefit of another. A trust for the benefit of such other person is charged upon the property, not by reason merely of the oral promise, but because of the fact that by means of such promise he had induced the transfer of the property to himself. *Brown v. Lynch*, 1 Paige, 147; *Thynn v. Thynn*, 1 Vern. 296; *Oldham v*

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Litchfield, 2 Vern. 506; *Devenish v. Baines*, Prec. in Ch. 3; 1 Story's Eq., § 768.

When these cases are cited in support of the doctrine that artifice or fraud in evading or preventing the execution of the writing is alone sufficient to induce a court of equity to disregard the statute and enforce the oral agreement, the subsequent change of situation or transfer of property, without which the deceit would be innocuous, seems to be overlooked, because it is not strictly in part performance of the agreement sought to be enforced. It must be manifest, however, that without such consequent act there would be no standing for the case in a court of equity. That which moves the court to a decree to enforce the agreement is not the artifice by which the execution of the writing has been evaded, but what the other party has been induced to do upon the faith of the agreement for such a writing. It is not that deceit, misrepresentation or fraud, of itself entitles a party to an equitable remedy; but that equity will interfere to prevent the accomplishment of the fraud which would result from the enforcement of legal rights contrary to the real agreement of the parties. Indeed, the fraud which alone justifies this exercise of equity powers, by relief against the statute of frauds, consists in the attempt to take advantage of that which has been done in performance or upon the faith of an agreement, while repudiating its obligations under cover of the statute. When a writing has been executed, the courts allow the fraud or mistake, by which an omission or defect in the instrument has been occasioned, to defeat the conclusiveness of the writing, and open the door for proof of the real agreement. But the obstacle of the statute of frauds to the enforcement of obligations, or the security of rights not expressed in the instrument, remains to be removed in the same manner as if there were no writing. *Phyfe v. Wardell*, 2 Edw. Ch. 47; *Moale v. Buchanan*, 11 Gill. & Johns. 314. The power to reform the instrument is not an independent power or branch of equity jurisdiction; but only a means of exercising the power of the court under its general jurisdiction in cases of fraud, accident and mistake.

We are aware that the limitation which we have undertaken to define has not been uniformly observed or recognized.

In *Wiswall v. Hall*, 3 Paige, 313, Chancellor WALWORTH granted a perpetual injunction, and ordered a decree of release of title to land omitted from a deed by fraud and secret contrivance. There was no discussion of the authorities, nor of the principles upon which the

case was decided; and no reference to the statute of frauds; and the statute does not appear, by the report, to have been set up against the prayer for relief.

In *De Peyster v. Hasbrouk*, 1 Kern. 591, a similar decision was made in the court of appeals in New York. Here again there is no reference to the statute of frauds, no discussion of the principles involved in the decision, and no authority or precedent cited except that of *Wiswall v. Hall*. The mortgagor, whose deed was reformed, put in no answer whatever. The defense was made by parties claiming under him, and the statute of frauds does not appear to have been pleaded. DENIO, C. J., in giving the opinion, proceeded to say: "It is unnecessary to refer to cases to establish the familiar doctrine, that, when through mistake or fraud a contract or conveyance fails to express the actual agreement of the parties, it will be reformed by a court of equity, so as to correspond with such actual agreement. The English cases have been ably digested by Chancellor KENT, and the principle has been stated with his accustomed care and accuracy, in *Gillespie v. Moon*, 2 Johns. Ch. 585."

But in *Gillespie v. Moon* the relief sought and granted was by way of restricting, and not by enlarging, the operation of the deed. Such relief would not, as already shown, conflict with the statute of frauds; and neither the discussion in that case, nor the citation of authorities, had reference to the bearing of the statute of frauds upon the question of affording relief upon contracts relating to land. Indeed, the English cases furnish but little aid upon that point, for the reason that the courts there have generally, without reference to the statute of frauds, refused to enforce written contracts with a modification or variation set up by parol proof. *Woollam v. Hearn*, 7 Ves. 211, and notes on the same in 2 Lead. Cas. in Eq. 404; *Nurse v. Seymour*, 13 Beav. 254.

The principle which was maintained by Chancellor KENT, and upon which the English authorities were cited by him in *Gillespie v. Moon*, was, that relief in equity against the operation of a written instrument, on the ground that by fraud or mistake it did not express the true contract of the parties, might be afforded to a plaintiff seeking a modification of the contract, as well as to a defendant resisting its enforcement. That proposition must be considered as fully established. 1 Story's Eq., § 161. It is quite another proposition, to enlarge the subject-matter of the contract, or to add a new term to the writing, by parol evidence, and enforce it. No such

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proposition was presented by the case of *Gillespie v. Moon*, and it does not sustain the right to such relief against the statute of frauds.

That Chancellor WALWORTH, in *Wiswall v. Hall*, did not intend to decide that the statute of frauds could be disregarded, if properly set up against such an enlargement of the operation of the written contract, is apparent from the remarks of the same learned judge in the subsequent case of *Cowles v. Bowne*, 10 Paige, 535. He says: "Whether a party can come into this court for the specific performance of a mere executory agreement for the sale of lands, which in its terms is materially variant from the written agreement between the parties that has been executed according to the statute, and where there has been no part performance or other equitable circumstances sufficient to take the case out of the statute of frauds, as a mere parol contract between the parties, is a question which it will not be necessary for me to consider in this case."

In *Gouverneur v. Titus*, 1 Edw. Ch. 480, there was a deed of land described as being in the north-west corner of a township, by mistake for the north-east corner. The grantor admitted the real contract, and had corrected the mistake by deed. The only question was, whether equity would enforce the corrected deed against the lien of a judgment creditor, who had notice of the mistake. In the opinion it is said: "It is a case in which this court would interfere, as between the immediate parties, to correct the mistake." The judgment was clearly right. The *dictum* we are disposed to question, unless the deed itself contained some other description by means of which the land might be identified and the mistake corrected.

In *Newsom v. Bufferlow*, 1 Dev. Eq. 379, a deed was reformed, which was made, by fraud, to include land not sold; and the fraudulent grantee was required to execute a reconveyance of the excess. The opinion contains a remark of the court, that this power may be exercised as well by inserting what was omitted, as by striking out what was wrongfully included. But this remark is clearly *obiter dictum*, and is not sustained by the authority cited, namely, *Gillespie v. Moon*.

In *Blodgett v. Hobart*, 18 Vt. 414, a mortgage was reformed by including other lands omitted by mistake. The statute of frauds was not set up in the answer, nor referred to in the opinion of the court; and the answer was considered by the court to be evasive in regard to the alleged agreement for security upon such other lands.

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In *Tilton v. Tilton*, 9 N. H. 385, the court controvert the doctrine of such a limitation, as declared in *Elder v. Elder*, 1 Fairf. 80; but the decision did not involve the question so discussed. The case arose from an attempted partition between tenants in common of real estate. There was a written agreement for partition according to the award of certain arbitrators named; and the only question was, as to the effect of a substitution of other arbitrators by parol. Deeds had been executed, and the plaintiff had fully performed his part of the agreement. It was a case of part performance sufficient to take the case out of the statute frauds, and was decided upon that ground. Besides, a partition of lands, though effected by mutual deeds of release, is not a contract for the sale of land.

Craig v. Kittridge, 3 Foster, 231, arose upon a partition, and was decided upon the authority of *Tilton v. Tilton*. *Smith v. Greeley*, 14 N. H. 378, was a decree upon default, without argument or opinion, against the executors and heirs of a party whose deed, by mutual mistake, failed to include certain land sold. It does not appear whether there was written evidence of the agreement, nor whether there was possession or acts of performance. It was sufficient, perhaps, that the statute was not pleaded, and the default admitted the agreement.

Caldwell v. Carrington, 9 Pet. 86, was an agreement for exchange of lands, and stands entirely upon the ground of part performance.

Notwithstanding contrary decisions and *dicta*, we are satisfied that, upon principle, the conveyance of land cannot be decreed in equity by reason merely of an oral agreement therefor, against a party denying the alleged agreement and relying upon the statute of frauds, in the absence of evidence of change of situation or part performance creating an estoppel against a plea of the statute. This rule applies as well to the enforcement of such an agreement by way of rectifying a deed, as to a direct suit for its specific performance. We are satisfied also that this is the rule to be derived from a great preponderance of the authorities. *Whitchurch v. Bevis*, 2 Bro. Ch. 559; *Woollam v. Hearn*, 7 Ves. 211; 2 Lead. Cas. in Eq. (3d Am. ed.) notes [*414], Am. notes, 691; *Townshend v. Stangroom*, 6 Ves. 328; *Beaumont v. Bramley*, Turner & Russell, 41. See also 11 Gill & Johns. 314; 19 Conn. 63, and 1 Fairf. 80, already cited above; *Adams*, Eq. 171, 172; *Churchill v. Rogers*, 3 T. B. Mon. 81; *Purcell v. Miner*, 4 Wall. 513.

The prayer in regard to the fence stands differently. If that stipu-

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lation had been fraudulently inserted in the deed, the agreement being otherwise, the deed might be reformed by striking out that provision, or requiring a release of it, so as to make the writing correspond with the actual agreement. But upon the allegations of the bill, there is no other agreement by which to reform the deed, and to which to make it conform. The plaintiff admits that the stipulation in the deed is precisely in accordance with the actual agreement. The fraud which he alleges relates only to the consideration or inducement upon which he was led to make that agreement; not to the form of the agreement itself. If that stipulation were to be stricken out, the writing would then not express the agreement actually made by the parties. The court cannot rectify an instrument otherwise than in accordance with the actual agreement. It cannot make an agreement for the parties. *Hunt v. Rousmaniere*, 1 Pet. 1, 14; *Brooks v. Stolley*, 3 McLean, 523. If the subject-matter of this stipulation were of sufficient materiality, the fraud alleged might have the effect to defeat the whole instrument. But this effect is not sought. The plaintiff's remedy, therefore, is at law, in damages for the deceit and false representation.

The alleged agreement, in regard to the premium and accrued interest upon the bonds transferred in payment for the land, will not sustain a bill in equity. If such an agreement was made and broken we see no reason why an action of assumpsit will not lie upon the agreement, or for the overpayment of the agreed price of the purchase. The remedy at law is as effectual as it can be in equity.

The entry must therefore be

Bill dismissed.

NASH V. LULL.

(103 Mass. 60.)

Consideration of promissory note—license under a patent.

Where the consideration of a promissory note is a license to use and vend an invention regularly patented, the unprofitableness of the invention does not vitiate the note.

ACTION on a promissory note for \$175, dated March 6, 1868. The note in controversy was made by the defendant in considera-

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tion of a license to vend and use in Berkshire an "improved animal churn power device," duly patented in the United States, May 9, 1865. Answer, no consideration. The defendant at the trial claimed that the invention could not be made a source of profit, and introduced the testimony of a practical mechanic to show "that, though it could be applied to raise water, or run a sewing-machine, and to other useful purposes, yet it could not be used profitably, and not beneficially because not profitably; that fifty pounds of power applied to the wheel of the machine produced only seven pounds of power for mechanical uses."

The defendant requested the following instructions: "1. That, if the jury find that though the patent 'Improved Animal Churn Power Device,' for which the note in this suit was given, is not void, yet if it cannot be used advantageously, without reference to pecuniary profits, then it is of no practical benefit, and without value, and therefore the note was given without consideration, and is void.

"2. It being proved that the consideration of this note was only to vend and use said device in the county of Berkshire, that, if said device could not be used advantageously, without reference to pecuniary profit, the note was without consideration, and void.

"3. It being proved that the consideration for the note was the right to use and vend said device in the county of Berkshire, if the jury are satisfied, from the whole evidence in the case, that such device was without value and worthless, the note was without consideration, and void.

"4. If the jury are satisfied, from the whole evidence in the case, that said device will not perform any beneficial work beneficially, it is no valid consideration for the note."

These instructions were refused and the judge ruled "that, if the 'Improved Animal Churn Power Device,' the right of using and vending which, as conveyed by the license to the defendant, was the consideration of the note declared on, to constitute a valid consideration it must have been a useful invention, that is to say, it must have been an invention capable of a beneficial use, in contradistinction to a pernicious or injurious use; that if, under any circumstances, the machine, to which the invention and deed of the defendant relate, could be applied to any beneficial purpose, as for the purpose of applying mechanical power, by means of animals, to churning or operating a sewing-machine or pump, it might be deemed a useful invention, notwithstanding its use for any such

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purpose might not be profitable to the person applying it to such use, and notwithstanding the mechanical results of such use might be inadequate to the cost of its use and the cost of said machine." The jury found for the plaintiff, and the defendant appealed.

P. L. Page, for defendant.

J. M. Barker (*T. P. Pingree* with him), for the plaintiff.

GRAY, J. Letters patent of the United States can be lawfully granted only for new and useful inventions; and are but *prima facie* evidence of the novelty and utility of the invention described. U. S. Stat. 1837, ch. 45; *Corning v. Burden*, 15 How. 270, 271. All that is required to make an invention useful, under the patent laws, is that it should be capable of being applied to some practical and beneficial purpose, and not to be frivolous, or injurious to the well being or morals of society. If it is useful in this sense, it is patentable, and the degree of its utility or practical value does not affect the validity of the patent; if it is not useful, a patent for it is void. *Lowell v. Lewis*, 1 Mason, 185, 186; *Bedford v. Hunt*, id. 303, 304; *Kneass v. Schuylkill Bank*, 4 Wash. C. O. 12; *Langdon v. DeGroot*, 1 Paine, 203; *Roberts v. Ward*, 4 McLean, 565.

In a suit brought on a promissory note, the only consideration for which is the assignment of an interest in or right under a patent, the question of consideration depends upon the validity of the patent; if the patent is void, the note is of course without consideration; but if it is valid, the court will not inquire into the adequacy of the consideration. The issue in such a case is, therefore, the same as in a suit in the courts of the United States for the infringement of a patent, the validity of which is denied by the defendant; and so it has been repeatedly adjudged in this and other courts. *Bliss v. Negus*, 8 Mass. 49; *Dickinson v. Halt*, 14 Pick. 217; *Bierce v. Stocking*, 11 Gray, 174; *Lester v. Palmer*, 4 Allen, 145; *Dunbar v. Marden*, 13 N. H. 311; *Cross v. Huntly*, 13 Wend. 385; *Geiger v. Cook*, 3 W. & S. 266; *McClure v. Jeffrey*, 8 Ind. 79; *Myers v. Turner*, 17 Ill. 179; *Jolliffe v. Collins*, 21 Mo. 343.

In the case of *Clough v. Patrick*, 37 Vt. 421, cited for the defendant, which seems at first sight to enlarge the issue in his favor, the defendant's evidence tended to show that the patented

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mowing machine, which was the consideration of the note sued on, was utterly worthless, and could not be made to work as a mowing machine at all, by reason of a defect in the principle of its construction ; and the ruling that "if the patent right was of no value from the worthlessness of the machine patented, in the respect which the defendant's evidence tended to show, that would constitute a perfect defense as to the payee, notwithstanding the patent may have been a legal one," was held to be correct, upon the ground that the expression "notwithstanding the patent may have been a legal one" meant no more than that the letters-patent were authentic and not vacated. Whether that construction of the ruling was warranted we need not consider.

It is proper to add that the further *dictum* in that case, like the corresponding decision (APPLETON, C. J., dissenting) in *Elmer v. Pennel*, 40 Me. 430, that the invalidity of a patent cannot be set up except in a suit brought in the courts of the United States against an infringer of the patent, is inconsistent with the principles above stated and the authorities already referred to. A direct suit for the infringement of a patent must indeed be brought in the courts of the United States, because the very acts of congress which create the right provide that all actions and cases, in law or equity, arising under those laws, shall be originally cognizable in those courts. U. S. Stat. 1836, ch. 357, § 17; 5 U. S. Stat. at Large, 124; *Gibson v. Woodworth*, 8 Paige, 132; *Dudley v. Mayhew*, 3 Comst. 9; *Parkhurst v. Kinsman*, 2 Halst. Ch. 600; *Kempton v. Bray*, 99 Mass. 354. But such a provision does not deprive the State courts of the power or the duty, when the question arises collaterally, of deciding whether the patent which is relied on is of any validity. *Rich v. Hotchkiss*, 16 Conn. 409; *Sherman v. Champlain Transportation Co.*, 31 Vt. 162; *Slemmer's Appeal*, 58 Penn. St. 155.

The instructions to the jury clearly and accurately stated the law applicable to the case, and fully met and covered the instructions requested.

Exceptions overruled.

Estes v. Tower.

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(103 Mass. 65.)

Promissory note — premature action on.

A promissory note not in terms payable at any place, but entitled to grace, was sued upon by the service of a writ at a quarter past six P. M. on the last day of grace, no demand of payment having been made. *Held*, that the action was premature.

ACTION on a promissory note. The note in controversy was dated February 9, 1853, payable in thirteen years to bearer without any specified place of payment. The officer served the writ at about 6 o'clock, February 12, 1866, and made a return of an attachment thereunder at 6½ P. M. There was no evidence of demand and refusal. The judge ruled that the action was prematurely commenced; plaintiff appealed.

S. W. Bowerman (with *W. H. Swift*), for appellant.

H. L. Dawes, for defendant.

GRAY, J. A promissory note entitled to grace is payable on demand at any reasonable time and place, on the last day of grace, and if the maker neglects or refuses payment upon such demand, the note is dishonored and may be put in suit immediately; but if no such demand is made, and he has done nothing amounting to a waiver of it, he has the whole of the day in which to make payment, and is not liable to an action until the expiration of the time within which such demand might have been made upon him. *Gordon v. Parmelee*, 15 Gray, 413. In the case of a note not in terms payable at a bank or other place of business, the demand may be made at the maker's dwelling-house at any hour at which, having regard to the habits and usages of the community in which he lives, he may reasonably be expected to be in a condition to attend to ordinary business, even as late as eight or nine o'clock in the evening. *Triggs v. Newnham*, 10 Moore, 249; *Farnsworth v. Allen*, 4 Gray, 453. It was therefore rightly ruled at the trial that this action was prematurely commenced.

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The case of *Cutler v. Kimball*, 5 Metc. 94, upon which the plaintiff relies, and in which the maker of a note was held liable, without a previous demand, upon a writ made after sunset on the last day of grace and delivered to an officer on the next day, does not rest upon the ground that suit might be brought immediately after sunset on the last day of grace, but upon the ground that it was reasonably to be inferred that the writ was filled up provisionally and not intended to be used until the next day, when it was delivered to the officer, and that the making of the writ was no more to be deemed the commencement of the action than if the plaintiff, instead of keeping it in his own hands, had delivered it to the officer that night with instructions not to serve it until the next day, or had sent it to the officer, but it had not yet reached him. *Swift v. Crocker*, 21 Pick. 241; *Seaver v. Lincoln*, id. 267; *Emerson v. White*, 10 Gray, 351.

In the case at bar, the writ was not only made, but served before any cause of action had accrued against the defendant.

Exceptions overruled.

 FRENCH V. VINING.

(103 Mass. 122.)

Sale of poisonous article—Extent and nature of warranty—Measure of damages.

V., the owner of a quantity of hay, knowing that white-lead paint had been spilt upon it, endeavored carefully to separate the damaged part from the rest, and supposed he had succeeded, and afterward sold the supposed undamaged part, without disclosing its condition, to F., whose cow ate thereof and died. *Held* that V. was liable, and that the measure of damages was the value of the cow, if F. used all reasonable means to restore her.

ACTION in tort to recover for the death of plaintiff's cow, caused by the defendant's alleged deceit and negligence. The trial was had in the superior court, before ROCKWELL, J., and the following are the material facts as presented in the bill of exceptions:

"There was evidence tending to show that white-lead paint was accidentally spilt upon the defendant's hay with his knowledge, about six months before the death of the cow; that he then carefully

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endeavored to separate the painted hay from the rest, did separate and remove a part, and supposed he had separated and removed the whole of the hay thus having paint adhering, from that which was entirely free therefrom; that from what remained he sold to the plaintiff six bagsfull from time to time as it was needed for her cow, for the purpose of being fed to the cow; that the cow ate all of it, except the last bagfull, of which a portion was given to her on a certain evening; that the cow was thereby found sick the next morning and continued sick for about a week until she died; that it was not suspected by the plaintiff that the cow was suffering from lead poisoning until three or four days before she died, when hay having paint upon it was found in the manger where the cow was fed, and shown to the plaintiff, and the plaintiff was then led to believe that the paint was the cause of the cow's sickness; and that a well-known veterinary surgeon and physician, educated in the theory and for about twenty years in the full and constant practice of the veterinary art, and acquainted with the nature and effect of lead poison, resided within about six miles of the residence of the plaintiff and the place where the cow was sick, and was not called or sent for by the plaintiff.

"The judge ruled that, if the cow died in consequence of eating the paint adhering to the hay sold by the defendant, the plaintiff might recover, although the defendant did not know or believe that there was paint upon the hay; and that the defendant was bound to use the utmost care in separating the paint from the hay so sold.

"The defendant requested the judge to instruct the jury as follows: That the only ground for claiming on the evidence was, that a warranty of the quality of the hay, or deceit in the sale of it, was proved, and in either case the measure of damages was the difference between the value of the hay as it was warranted to be, and as it actually was; that if the defendant sold to the plaintiff the hay in good faith, having faithfully endeavored and, as he supposed, succeeded, before the sale, to separate from it whatever would render it unwholesome or injurious, the plaintiff could not recover in this action, although the defendant sold with the knowledge that the hay was to be fed to the plaintiff's cow and for that purpose; that if the plaintiff, while the cow was sick, and several days before it died, knew, or had reason to believe, that the cow was suffering from lead poison, and neglected to procure the advice and assistance of a veterinary surgeon or physician having knowledge of the remedies

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for such poison, and skill in their use, when such advice and assistance were within reasonable distance and could be had at reasonable expense, then the plaintiff could not recover in this action."

But the judge declined to give such instructions in the form presented, and instructed the jury as follows: "To sustain her action the plaintiff must satisfy the jury affirmatively that the poisoned hay was the cause of the death of the cow. It being admitted that the defendant knew that white-lead paint had run upon the hay, and that the defendant sold some of the hay to the plaintiff, and there being no evidence of knowledge of this on the part of the plaintiff, it was the duty of the defendant to remove the paint from the hay before selling and delivering it; and, if the cow died from eating the poisoned hay, the defendant was liable in this action, and the rule of damages was the value of the cow. If the plaintiff, while the cow was sick, and several days before she died, knew that the cow was suffering and in danger of death from lead pcison, she was bound to employ the best remedies within her reasonable reach, at reasonable trouble and expense; and if the jury were satisfied that such remedies would have been effectual, and the plaintiff did not seek for their use nor inform the defendant seasonably of the facts, she could not recover."

The verdict was for the plaintiff, and the defendant appealed.

S. T. Spaulding, for defendant (appellant):

1. There was no warranty implied in the sale. 1 Smith's Lead Cas. (6th Am. ed.) 303; *Emmerton v. Matthews*, 7 H. & N. 585; *Emerson v. Brigham*, 10 Mass. 197; *Peckham v. Holman*, 11 Pick. 484; *Burnby v. Bollett*, 16 M. & W. 644; *Moses v. Mead*, 1 Denio, 378; *Smith v. Marrable*, 11 M. & W. 5; *Sutton v. Temple*, 12 id. 52; *Hart v. Windsor*, id. 68; *Turner v. Mucklow*, 1 H. & C. (Am. ed.) 859; S. C., Law Times (N. S.) 690; 8 Jur. (N. S.) 870; *Dickson v. Jordan*, 11 Ired. 166; *Archdale v. Moore*, 19 Ill. 565; *Mason v. Chappell*, 15 Grat. 572; *Milburn v. Belloni*, 34 Barb. 607.

2. The plaintiff should have employed a veterinary surgeon. *Eastman v. Sanborn*, 3 Allen, 594; *Dean v. Keate*, 3 Camp. 4.

W. Allen, for plaintiff.

AMES, J. The only warranty implied by law in the sale of personal property is simply that the vendor has good right to make the sale; and if the buyer desires to have the benefit of any further

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assurance, as to the property sold, he must protect himself by insisting upon such specific warranties as he may consider necessary for that purpose. The law does not undertake to make contracts for the parties, but usually leaves them, if the buyer should choose to act upon his own judgment, to the operation of the maxim *caveat emptor*. It is sometimes rather loosely said that mere silence, on the part of the vendor, as to a known defect, does not amount to a fraud. But this is far from being universally true. Deceit may sometimes take a negative form, and there may be circumstances in which silence would have all the legal characteristics of actual misrepresentation. There are cases in which it is laid down that in the sale of provisions for domestic use there is an implied warranty of their wholesomeness. *Van Vrocklin v. Fonda*, 12 Johns. 468; *Emerson v. Brigham*, 10 Mass. 197; *Winsor v. Lombard*, 18 Pick. 57, 62. And it is perfectly well settled that there is an implied warranty, in regard to manufactured articles purchased for a particular use, which is made known at the time of the sale to the vendor, that they are reasonably fit for the use for which they are purchased.

It may perhaps be more accurate to say, that, independently of any express and formal stipulation, the relation of the buyer to the seller may be of such a character as to impose a duty upon the seller, differing very little from a warranty. The circumstances attending the sale may be equivalent to a distinct affirmation on his part as to the quality of the thing sold. A grocer, for instance, who sells at retail, may be presumed to have some general notion of the uses which his customers will probably make of the articles which they buy of him. If they purchase flour or sugar, or other articles of daily domestic use for their families, or grain or meal for their cattle, the act of selling to them under such circumstances is equivalent to an affirmation that the things sold are at least wholesome, and reasonably fit for use; and proof that he knew, at the time of the sale, that they were not wholesome and reasonably fit for use would be enough to sustain an action against him for deceit, if he had not disclosed the true state of the facts. The buyer has a right to suppose that the thing which he buys, under such circumstances, is what it appears to be, and such purchases are usually made with a reliance upon the supposed skill or actual knowledge of the vendor. In the case at bar, the plaintiff bought the hay in small quantities, and the defendant must be considered as knowing generally the kind of use to which it was to be applied. The act of sale under

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such circumstances was equivalent to an express assurance that the hay was suitable for such use. If he knew that the hay had a defect about it, or had met with an accident that rendered it not only unsuitable for that use, but dangerous or poisonous, it would plainly be a violation of good faith, and an illegal act to sell it to the plaintiff without disclosing its condition. Silence in such a case would be deceit. *Langridge v. Levy*, 2 M. & W. 519; *Thomas v. Winchester*, 2 Seld. 397; *McDonald v. Snelling*, 14 Allen, 290, 295, and cases cited.

The declaration charges that at the time of the sale the defendant knew the condition of the hay. The *scienter* is not only a material, but a vital part, of the case. It appears that he knew that paint, containing white lead, had been spilt upon the hay, and he must be taken to have known that hay in that condition was unwholesome and dangerous. He endeavored carefully to separate the damaged part from the rest, and supposed that he had been entirely successful in that endeavor. But after making all allowances in his favor the fact remains that he sold, as food for cattle, an article which he knew had been exposed to poison, and which he had taken no effectual means to separate and purify from that poison. His knowledge of the accident was certain and positive; his belief of the success of his remedy for that accident was conjectural, uncertain, and proved to be wholly mistaken. It appears to us that, in venturing to sell the hay, under such circumstances, on his own judgment that it was safe to do so, he took the risk upon himself, and sold at his peril; and that the charge in the declaration, that he knew the condition of the hay when he sold it, is satisfied by showing that he knew what had happened to it; that he did not and could not know that the effect of the accident had been removed; and that he had in fact taken no effectual means to remove it. The ruling of the presiding judge appears upon this point to have been correct.

With regard to the duty incumbent on the plaintiff after the cow was found to be sick, the ruling was also correct, and as favorable to the defendant as he had any right to expect. There is nothing in the bill of exceptions to show that the plaintiff was informed of the fact that there was a competent veterinary surgeon within reach, or upon what terms his services could have been obtained, or whether any cure for the sickness was possible, and therefore the general instructions that were given appear to have been all that the case in that respect, required.

Exceptions overruled.

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SHELburne FALLS NATIONAL BANK v. TOWNSLEY.

(103 Mass. 177.)

Notice of protest between indorsers of promissory note — drop letter.

On the 10th of July, 1866, a bank received notice of the dishonor of a promissory note which it had discounted, and on the 11th, after the close of the business day, notified its immediate indorser by a drop letter which he did not receive until the 12th, there being no system of carriers. *Held*, insufficient notice to charge the indorser.

ACTION to recover from the indorser of two promissory notes by a bank which had discounted said notes. The notes were made by Stockbridge, payable to the order of Ballard, indorsed by Ballard and the defendant, and discounted for Ballard by the plaintiffs. Answer, insufficient notice of presentment and dishonor. The facts appear in the bill of exceptions allowed by DEVENS, J., in the superior court, and are as follows:

“ It appeared that the defendant was an accommodation indorser at the request of Ballard, and for his benefit, and that this fact was known to the bank when the notes were discounted. The only question submitted to the jury was, as to the sufficiency of the notice to the defendant of the dishonor of the second note. This note was dated April 5, 1866; was payable at the office of the maker, in the city of New York, in three months from its date; and was protested in New York on July 7, 1866, July 8 being Sunday.

“ To prove notice to the defendant of the dishonor of the note, the plaintiff, in addition to testimony tending to show that the defendant, in several interviews on the subject of payment, did not object to any want of notice, or claim that he was not notified, introduced the following evidence from the deposition of George W. Warren, cashier of the plaintiff bank: ‘ In due course of mail after the maturity of said notes and each of them, I received from Myron Winslow, a person representing himself in the notices to be a duly qualified notary public in New York, on different dates, notices of the non-payment of each of said notes. There were three notices relating to each of said notes, which were respectively addressed to Franklin Ballard, William P. Townsley, and myself, as cashier of the bank. Said notices were in writing or print. I cannot give the exact date

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when said notices and each of them were by me sent to Townsley, but they were, upon the receipt of the same from Winslow, as stated, immediately sent by me to Townsley. They were each put in the Shelburne Falls post-office, and were directed, as nearly as I can remember, respectively thus: "Wm. P. Townsley, Esq., Shelburne Falls. Mass."

"The plaintiffs also^o introduced the testimony of Alfred Bowen, postmaster of Shelburne Falls at the time of the dishonor of said note and since, who testified that at the time, the defendant lived in Buckland, about half way between the post-office of Shelburne Falls and Buckland, was in the habit of visiting Shelburne Falls constantly and frequently, and was in the habit of receiving mail matter at that post-office as well as at Buckland; and further stated, 'We got our mails at Shelburne Falls from New York in the evening.' The witness, on cross-examination, stated that in 1866, 'due course of mail' from New York city, would bring a letter leaving New York by the early morning's mail to Shelburne Falls the same evening: and this was the only evidence in the case on this point.

"The defendant testified that he received the notice of the dishonor of the note at Shelburne Falls post-office, and that he could not state the day of its reception; and on cross-examination said: 'I never knew (or said) but I was notified all right, I didn't know.' He further testified that Warren, the cashier, knew his residence at the time of the dishonor of the note; and that he received letters at both the post-offices named, no more at one than the other, though Buckland, as his residence, he considered his true post-office address. He then produced the notice received on the dishonor of the note, and the envelope in which it was received. The notice was in due form and was dated 'New York, July 7, 1866.' The envelope was addressed 'Wm. P. Townsley, Esq., Shelburne Falls, Mass.,' and bore the post mark Shelburne Falls, Mass., July 12, 1866.' It was stamped on the face with a three cents postage stamp, and bore on the back a seal or stamp of the plaintiff bank.

"The defendant asked the judge to rule that the notice addressed and mailed by Warren to the defendant at Shelburne Falls was not a sufficient notice. This he refused to rule; but instructed the jury that, if the defendant was in the habit of receiving letters at both of the post-offices named, the notice would be sufficient, if addressed and mailed to him at Shelburne Falls. To this ruling the defendant excepted.

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“The plaintiffs’ counsel argued to the jury, that the plaintiffs’ cashier acted with due diligence, if he placed the notice in the office on July 11; and that, if he did so, it might bear the post-mark for the mail of the 12th. The defendant’s counsel, at the close of the charge (to which no exception was taken save as above), requested the court to rule that the legal presumption is that the date of the post-mark on a drop-letter is that of the day it is placed in the post-office; which ruling the judge refused to give, but left the fact that such was the post-mark upon the letter as one to be considered in determining whether the notice was actually mailed.

“The judge had previously instructed the jury that the plaintiffs must satisfy them that the notices were seasonably forwarded by the notary in New York to the cashier of the plaintiff bank, and by the cashier, after the reception thereof, seasonably put into the post-office directed as above; that the burden of proof was upon the plaintiff all the way through; and that, if the notices were received by the plaintiff bank before the 11th, the jury must be satisfied that notice was put into the post-office prior to the 12th, as indicated by the post-mark upon the envelope introduced by the defendant.”

The jury found for the plaintiffs, and the defendants appealed.

D. Aiken and *W. S. B. Hopkins*, for defendant (appellant).

S. T. Fields, for plaintiffs.

AMES, J. It is not necessary, in order to charge all the indorsers of a dishonored bill or promissory note, that notice should be transmitted to them simultaneously. They may all be made severally liable by notices given in regular succession by each indorsee to his immediate indorser. It is also unnecessary, in order to make these notices effectual, that each party receiving such a notice should lay all other business aside for the purpose of transmitting a like notice to his immediate predecessor. On the contrary, it is well settled that each party so notified is sufficiently diligent for the purpose of charging his immediate indorser, if he transmits a suitable notification on the next day. *Grand Bank v. Blanchard*, 23 Pick. 305; *Housatonic Bank v. Laflin*, 5 Cush. 546, 550. The case before us was apparently tried upon the assumption that the official notifications prepared by the notary were seasonably forwarded from New York and received by the plaintiffs; and the whole controversy was as to the sufficiency of the notice which they undertook to give to the defendant.

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Upon this point, the testimony of the plaintiffs' cashier was to the effect that, immediately upon the receipt of the notification by mail from the notary public, it was sent to the defendant. He said, however, that he could not tell on what day he sent it, and the testimony of the postmaster renders it at least possible that it may have come to the hands of the cashier as early as the 10th day of July. There is nothing, then, in the report of the case, that can be said to make it certain that the notification was forwarded immediately to the defendant, or to exclude the idea that it may have been delayed till the next day. The mode of forwarding it was by inclosing it in an envelope, left at the post-office in Shelburne Falls, addressed "Wm. P. Townsley, Esq., Shelburne Falls, Mass.," and this envelope was post-marked "Shelburne Falls, July 12," the note having matured and been protested, at New York, on Saturday, July 7.

The presiding judge ruled that this was a sufficient notice, provided the defendant was in the habit of receiving letters at Shelburne Falls post-office, as well as at the village where he resided. The plaintiffs' argument at the trial seems to imply that a notification left at the post-office on the 11th, to be received on the 12th, would be seasonable; and the presiding judge appears, from the report, to have acquiesced in that claim. We consider the verdict of the jury as decisive upon the point that the letter was left in the post-office on the 11th. The defendant claimed at the trial that, inasmuch as the letter was post-marked July 12, there was a legal presumption that it was not deposited in the post-office until that day. The presiding judge refused so to rule, and, in our opinion, was right in that refusal. A letter deposited on the 11th might happen not to be noticed or stamped until the 12th. It was sufficient, on this point, to instruct the jury that the post-mark was one of the circumstances to be taken into consideration, with others, in deciding whether the letter was actually left on the 11th, or not till the 12th.

It is well settled, that where the transaction, of which notice is to be given, takes place in the same town in which the party to whom the notice is to be given resides, such notice must be personal, or at his domicile or place of business, and not through the post-office. *Pierce v. Pendar*, 5 Metc. 352; *Chitty on Bills* (12th Am. ed.) 473, and cases cited. It is also well settled, that, when the party resides in another town, notice by the post-office is sufficient (*Munn*

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v. *Baldwin*, 6 Mass. 316), and conclusive, even though it was in fact never received. *Shed v. Brett*, 1 Pick. 401. In this case the transaction occurred in New York, and not in Buckland, where the defendant resided. The letter, however, in which the plaintiffs undertook to give the notice, was addressed to the defendant, not at Buckland, but at Shelburne Falls, and the report shows that he was in the habit of receiving letters at the post-offices of these two places respectively, and about as often at one as at the other. The question as to the proper mode of notifying a man by mail depends much less on the place of his exact legal domicile than upon the locality of the post-office at which he usually receives his letters; and if he is in the habit of resorting, for that purpose, equally and indifferently to two post-offices, a communication may very properly be addressed to him at either. *United States Bank v. Carneal*, 2 Pet. 543; Story on Notes, § 343. The plaintiffs appear to have put him on the same footing, for the purpose of post-office communication, as if he were a resident of Shelburne Falls. The letter was left at the post-office, not for the purpose of being transmitted by mail to any other town or post-office, and not to go into the hands of any official carrier charged with the distribution of letters at the dwelling-houses and places of business of inhabitants of the vicinity; on the contrary, it did not go into the mail at all, but was simply deposited at the Shelburne Falls post-office, to remain there until called for by the defendant.

We do not find that any case has gone so far as to decide that notice through the post-office may be given in the same manner and with the same allowance of time, where both parties reside in one town or resort to the same post-office, as when they reside in different towns, communicating with each other by regular mails. There may be very little practical difference in this respect between letters left for deposit and those left for transmission. But we do not feel at liberty, for such considerations, to disregard well-established distinctions, even though they may appear somewhat arbitrary; or to attempt to improve rules that have become settled by judicial decisions and the usages of business. It has been decided expressly in New York, that, where the indorser resides in the same town or village as the holder, service of notice through the post-office is irregular. *Ransom v. Mack*, 2 Hill, 587. "The post-office is not a place of deposit for notices to indorsers, except where the notice is to be transmitted by mail to another office." *Sheldon v. Benham*, 4 Hill, 129, 133.

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The case of *Eagle Bank v. Hathaway*, 5 Metc. 212, has an important bearing upon the case at bar. That was the case of a bill presented to the acceptor in Philadelphia, and protested for non-payment. The notary, as in the case at bar, made out his written notifications for the successive indorsers, and sent them by mail to the plaintiffs at their place of business. Their cashier sent the notices to the post-office, one of them being addressed to the defendant at the same place. Chief Justice SHAW, in delivering the judgment of the court, uses this language: "On the whole, as the transaction to be notified to the defendant took place in Philadelphia, as notice to him by mail from there" "would have been good; as the cashier was the conduit of conveyance, and not the party from whom the notice emanated; as the defendant, if he were looking for notice of the dishonor of this bill of exchange payable in Philadelphia, would naturally look to the post-office for that notice; we are of opinion that notice by the post-office under these circumstances must be deemed good." That case, however, differs from the one before us, in showing that the notification was left by the cashier at the post-office on the day of its reaching his hands, and that it must have reached the defendant as early as if it had been directed and sent to him by mail from Philadelphia; so that substantially he was notified by the notary in regular course of mail. But, considered as an independent notice, emanating from an indorser, who, by being himself properly notified, has become chargeable, and desires to notify his immediate indorser, and thereby to hold him, a notice by a drop-letter, given on the next day, finds little or no support in that case. In the instructions which were given to the jury, this distinction appears to have been overlooked, and they may have given their verdict under the impression that a drop-letter left at the post-office after the close of the business day on the 11th, and not likely to be received until the 12th, would be seasonable, even though the plaintiff bank had received the notice itself as early as the 10th: in other words, that the rule as to post-office notification, where both parties reside in the same town or village, and resort to the same post-office, and where no system of distribution by means of letter carriers has been established, would be the same as if they lived in separate towns having regular communication by mail. Upon this point, therefore, the defendants'

Exceptions must be sustained.

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COOPER v. MASSACHUSETTS MUTUAL LIFE INS Co.

(103 Mass. 287.)

Life insurance — construction of policy — suicide.

Where a proviso in a life insurance policy is, that it shall be void if the assured "shall die by suicide," and the assured took a rope and hung himself, there can be no recovery on the policy, although the act of self destruction was committed under the influence of insanity, in the absence of evidence proving delirium or madness, or that the act was involuntary.

ACTION on a life insurance policy made by the defendants to one Cooper for \$3,000. The policy contained the following proviso:

"Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is accepted by the assured upon this express condition, that if said person whose life is hereby insured, shall become so far intemperate as to impair his health seriously and permanently, or induce delirium tremens, or shall die by suicide, or in consequence of a duel, or by the hands of justice, or in the violation of, or to attempt to violate, the laws of the United States, or of any State, county or place, this policy shall thereupon terminate, and be void and of no effect.

At the trial, the plaintiff's counsel "stated the cause and manner of the death of the assured to be as follows: On the 15th of May, 1868, about six o'clock in the morning, the assured rose from his bed, which was upon the second floor of the house, and without dressing himself, went up stairs to the attic, took a piece of old bed-cord which had been left lying on the attic floor, and then, placing a chair near the door, he fastened one end of the cord over the upper part of the door frame and there hung himself by the neck. No person was in the assured's sleeping-room at the time he left it, or saw him afterward until he was dead."

"The plaintiff's counsel further stated that, in order to take the death of the assured, in the manner stated, out of the proviso of the policy, and to show that the policy was nevertheless valid and binding upon the defendants, they would prove that the assured at the time of committing the act of self-destruction was insane, that he acted under the influence and impulse of insanity, and that his act of self-destruction was the direct result of his insanity.

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"The judge thereupon ruled, upon the request of the defendants, that the plaintiff could not recover even if she should prove all the facts stated in the opening, and ordered a verdict for the defendants." The plaintiff appealed.

G. D. Robinson, for plaintiff (appellant).

G. M. Stearns (*M. P. Knowlton* with him), for defendants.

CHAPMAN, C. J. The proviso in the policy is, that it shall be void if the assured "shall die by suicide." The plaintiff offered to prove that the assured, at the time of committing the act of self-destruction, was insane; that he acted under the impulse of insanity, and that his act of self-destruction was the direct result of his insanity. The question presented is, whether, if these facts are true, the act of self-destruction avoids the policy, within the terms of the proviso. The subject has been so fully discussed in the cases cited, that further argument is needless. We need only collate the cases.

In *Borradaile v. Hunter*, 5 M. & G. 639, the words were, "if the assured should die by his own hand." He drowned himself in the Thames, and the jury found that he did it voluntarily, but that he was not capable of judging between right and wrong. It was held that the proviso was not limited to acts of felonious suicide, and that the policy was void. TINDAL, C. J., dissented. But the jury were instructed that it must appear that the assured was conscious of the probable consequences of his act, and did it for the express purpose of destroying himself voluntarily, having at the time sufficient mind and will to destroy himself.

In *Clift v. Schwabe*, 3 C. B. 437, the words were, "should commit suicide." The assured swallowed a quantity of sulphuric acid sufficient to occasion death, for the purpose of killing himself, of which he died the next day. It was held by PARKE and ALDERSON, BB., PATTERSON, J., and ROLFE, B., to be immaterial whether he was a responsible agent. POLLOCK, C. B., and WRIGHTMAN, J., dissented. But ALDERSON, B., says the words do not apply to cases in which the will is not exercised at all, as when death results from accident or delirium, but when the destruction is voluntary, though the will may be perverted.

In *Dean v. American Insurance Co.*, 4 Allen, 96, the words were like those in *Borradaile v. Hunter*, "shall die by his own hand."

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The assured cut his throat with a razor. The plaintiff, however, alleged and offered to prove that the act whereby the death was caused was the direct result of insanity; that the insanity was what is called suicidal depression, impelling him to take his life, and that suicide is the necessary and direct result of such insanity or disease; and it was held that this avoided the policy. But BIGELOW, C. J., in giving the opinion, adverts to the word "suicide," and avoids discussing its signification, thereby leaving the present case undecided by this court. But he says that, if the death is caused in the madness of delirium, or under any combination of circumstances from which it may be fairly inferred that the act of self-destruction was not the result of the will and intention of the party, adapting the means to the end and contemplating the physical nature and effects of the act, it would not be within the policy. This limitation is, in substance, the same with that which is quoted from the other cases cited.

In *Eastabrook v. Union Insurance Co.*, 54 Me. 224, the words were "shall die by his own hand." The jury found that the self-destruction was the result of a blind and irresistible impulse over which the will had no control, and was not an act of volition. It was held that this did not avoid the policy; and APPLETON, C. J., in a very elaborate opinion, says the decision was in entire conformity with the law as stated in *Dean v. American Insurance Co.*, referring to the limitation stated above. But KENT, J., dissented.

In *Breasted v. Farmers' Loan & Trust Co.*, 4 Seld. 299, the words were, "should die by his own hand." It was held, by a majority of the court of appeals, three of the justices dissenting, that, if the assured was insane, and incapable of discerning between right and wrong, his suicide did not avoid the policy. This decision is at variance with the other authorities cited, and is contrary to our own interpretation of the same words in *Dean v. American Insurance Co.*

Upon a careful consideration of the elaborate discussion of the matter in the cases above cited, by the dissenting judges as well as by those in the majority, we think that, as applied to this case, there is no substantial difference of signification between the phrases "shall die by his own hand," "shall commit suicide," and "shall die by suicide;" and that they include self-destruction under the influence of insanity, within the limitation above stated. In the present case, there was no offer to prove madness or delirium, or that the act of self-destruction was not the result of the will and intention of the party, adapting the means to the end, and contemplating the physi-

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cal nature and effects of the act. The insanity, therefore, was not such as to take the case out of the proviso.

Exceptions overruled.

NOTE.—Considering the limited knowledge which the courts have on the subject of insanity, it is not wonderful that they have been unable to agree as to the effect of suicide on life insurance.

Most policies contain provisions rendering them void in case the assured shall die by his own hand, or shall commit suicide, or shall die by suicide. That these are synonymous terms is not disputed, but whether they include self-destruction under the influence of insanity, as ordinarily understood, is not agreed.

That suicide is not necessarily the effect of mental derangement, but may be the act of a sound, rational mind, is admitted by the most eminent writers on insanity; but that it frequently is the result of insanity, in one form or another, is settled beyond dispute. Ray divides suicides into two classes, founded upon the different causes or circumstances by which they are actuated. The first includes those who have deliberately committed the act from the force of moral motives alone; the second, those who have been affected with some pathological condition of the brain, excited or not by moral motives. Ray on Insanity, 487. Under the first division may be classed those cases where the suicide has been committed to escape infamy, or on account of a sudden and serious reverse of fortune, etc. Under the second head he classes suicides resulting from a melancholy disposition, or from an impulse or propensity to self-destruction, etc.

The authorities concur with considerable unanimity that suicide resulting from some forms of insanity is not covered by the terms of the policy above quoted; but what shall be the criterion is far from settled. The one sustained by some of the authorities, and by the dictates of common sense, is the same as if the act were that of homicide—did the person know right from wrong, etc.? And, to sustain this view, the maxim of *noscitur a sociis* has been brought to bear. The terms "suicide," or "death by his own hand," are generally placed in the policy in connection with the other exceptions—"death in consequence of a duel, or by the hands of justice, or in the known violation of any law." And it is contended that this coupling of the words together shows that they are to be understood in the same sense, and that, inasmuch as the last three exceptions designate criminal acts, the first must be taken to designate a similar act—that is, felonious self-killing. There is another well-known rule of construction that has been applied by the courts, holding that "suicide," as used, means *felo de se*, viz.: that the words of the proviso, being the words of the insurers and not the assured, are to be taken, if doubtful, most strongly against the former.

The English courts have adopted an interpretation more liberal to the insurer. In *Berradale v. Hunter*, 5 Man. & Gran. (1848), the policy contained a proviso that, in case the assured should die by his own hands, or by the hands of justice, or in consequence of a duel, the policy should be void. The assured threw himself into the Thames, and was drowned. The court instructed the jury that "if the assured by his own act intentionally destroyed his own life, and that he was not only conscious of the probable consequences of the act, but did it for the express purpose of destroying himself voluntarily, having at the time sufficient mind to will to destroy his life, the case would be brought within the condition of the policy; but if he was not in a state of mind to know the consequences of the act, then it would not come within the condition." The jury found that the assured "voluntarily threw himself into the water, knowing at the time that he should thereby destroy his life, and intending thereby to do so, but at the time of committing the act he was not capable of judging between right and wrong." By the first part of the verdict it was made a case of *felo de se*, and by the last part a case of insanity. Judgment was entered for the office, and was subsequently affirmed by three of the judges of the common pleas, TINDAL, C. J., dissenting. Much stress was laid by the majority upon the fact that the jury found the act of self-destruction to have been voluntary. ERSKINE, J., said: "Looking simply at that branch

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of the proviso upon which the issue was raised, it seems to me that the only qualification that a liberal interpretation of the words with reference to the nature of the contract requires is, that the act of self-destruction should be the voluntary and willful act of a man having at the time sufficient powers of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by that act; and that the question whether at the time he was capable of understanding and appreciating the moral nature and quality of his purpose is not relevant to the inquiry, further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself. It appears indeed to me that, excluding for the present the consideration of the immediate context of the words in question, the fair inference to be drawn from the nature of the contract would be, that the parties intended to include all willful acts of self-destruction, whatever might be the moral responsibility of the assured at the time."

The next English case was that of *Schwabe v. Clift* (1846), which was tried at *nisi prius*, before CRESSWELL, J. It was upon a policy containing the provision that if the assured should "commit suicide," etc., the policy should be void. The assured died from the effects of sulphuric acid taken by himself, but evidence was given tending to show that at the time he took the acid he was, in fact, of unsound mind. In his charge to the jury, the learned judge said, that to bring the case within the exception it must be made to appear that the deceased died by his own voluntary act; that at the time he committed that act he could distinguish between right and wrong, so as to be able to understand and appreciate the nature and quality of the act he was doing, and that, therefore, he was at that time a responsible being. The jury found for the plaintiff. 2 Car. & Kirwan, 184. The cause was afterward brought into the court of exchequer chamber, and will be found in 8 Man. & Gr. 437, by the title of *Clift v. Schwabe*. That court, by a vote of four to two, ordered a new trial, holding that the direction was erroneous; for that the terms of the condition included all acts of voluntary self-destruction irrespective of the question of moral responsibility. This case seems to turn, like the former one, on the assumed fact that the suicide was voluntary.

The question first arose in this country in the case of *Breasted v. The Farmers' Loan and Trust Co.*, 4 Hill, 73 (1843). The policy contained a provision that it should be void if the assured "die upon the seas, or by his own hand, or in consequence of a duel, or by the hands of justice." The defendants pleaded that the assured committed suicide by drowning himself in the Hudson river. Replication that he was insane at the time, to which the defendants demurred. The court overruled the demurrer, holding that suicide, as used in policies, involves the deliberate termination of one's existence while in the possession and enjoyment of his mental faculties, and the drowning of the assured was no more his act, in the sense of the law, than if he had been impelled by irresistible physical force.

The cause was subsequently tried by referees, who reported in favor of the plaintiff, and who found specially, "that the assured, on the 25th day of June, 1839, threw himself into the Hudson river from the steamboat Erie, while insane, for the purpose of drowning himself, not being mentally capable at the time of distinguishing between right and wrong." The judgment entered upon this report was affirmed in the court of appeals. 8 N. Y. 299. The principles and authorities were very elaborately examined by Mr. Justice WILLARD, who delivered the prevailing opinion, and the conclusion reached, that the terms "suicide," or "die by his own hand," as used in the policies of insurance, means a felonious self-killing, and not a self-killing by a person incapable of distinguishing between right and wrong. This decision was dissented from by three of the eight judges.

In *Hartman v. Keystone Insurance Company*, 21 Penn. St. 466 (1853), it was held, that suicide, by taking arsenic, avoided a policy conditioned to be void if the assured shall die by his own hand," and that, even if no condition had been in the policy, suicide was such a fraud on the insurers as would prevent a recovery. It does not appear that there was any allegation or proof of insanity, and the remarks of the court as to suicide were nowise necessary to the decision; besides, the last proposition is in direct conflict with the English cases. See *Dormay v. Borradaile*, 10 Beav. 335.

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The question next arose in the case of *Dean v. The American Mutual Life Insurance Company*, 4 Allen, 96 (1868). The conditions in the policy were the same as in the case of *Breasted*. The assured came to his death by cutting his throat with a razor. The plaintiff offered to prove that the death was caused during a state of insanity. The court held that the plaintiff was not entitled to recover; that "the facts agreed upon by the parties, concerning the mode in which the plaintiff's intestate took his own life, leave no room for doubt that self-destruction was intended by him, he having sufficient capacity at the time to understand the nature of the act which he was about to commit, and the consequences which would result from it."

The opinion in this case is singularly self-contradictory and inconclusive, but it is certainly not an authority against the proposition that suicides resulting from some form of insanity are not covered by the usual provisos in life policies. At the very opening a distinction is drawn between the terms "suicide," and "die by his own hand." The court remarked: "In considering the question, we are relieved of one difficulty which has embarrassed the discussion of the same subject in other cases. If the proviso had excepted from the policy death by 'suicide,' it would have been open to the plaintiffs to contend that this word was to have a strict technical definition, as meaning, in a legal sense, an act of criminal self-destruction, to which is necessarily attached the moral responsibility of taking one's life voluntarily and in the full exercise of sound reason and discretion." This statement is wrong, both in fact and in law. Only one case theretofore decided had been "embarrassed" by the term "suicide"—that of *Chyt v. Schwabe*, *supra*; all the others had contained the same proviso as this case, viz.: die by his own hand. That it is wrong as to the law has been since held by the same court in the above case of *Cooper v. Massachusetts Insurance Co.*, wherein it said there is no substantial difference in signification between the phrases "shall die by his own hand," "shall commit suicide," and "shall die by suicide." The court further said: "It is against risks of this nature—the destruction of life by the voluntary and intentional act of the party assured—that the exception in the proviso is intended to protect the insurers." "If the suicide was an act of volition, however excited or impelled, it may in a just sense be said that he died by his own hand. But, beyond this, it would not be reasonable to extend the meaning of the proviso. If the death was caused by accident, by superior and overwhelming force, in the madness of delirium, or under any combination of circumstances from which it may be fairly inferred that the act of self-destruction was not the result of the will or intention of the party adopting means to the end, and contemplating the physical nature and effects of the act, then it may be justly held to be a loss not excepted, within the meaning of the proviso. A party cannot be said to die by his own hand in the sense in which those words are used in the policies, whose self-destruction does not proceed from the exercise of an act of volition, but is the result of a blind impulse or mistake, or accident, or of other circumstances over which the will can exercise no control."

The question was again discussed by the supreme court of Maine, in the case of *Eastabrook v. The Union Mutual Life Insurance Co.*, 54 Me. 224 (1866). In that case the policy was to be void in case the assured "shall die by his own hands." The death was by suicide in a fit of insanity. The court held that the case was not within the exception of the policy. That "death, whether by disease, by accident, or the result of insanity, is in each case within the general object of the policy." But the case cannot be said to be a direct authority against the decision of the Massachusetts court in *Dean's* case, as the court found that "the defendants had the benefit of instructions in entire conformity with the law, as stated by the supreme court of Massachusetts in *Dean v. American Mutual Life Insurance Co.*, and the jury have, in the evidence, found the facts such as in accordance with the law of that case would justify their verdict."

The St. Louis Mutual Life Insurance Co. v. Graves, reported in Bigelow's Life and Accident Insurance Reports, 763, was before the supreme court of Kentucky in 1869. The policy was conditioned to be void in case the assured "shall die by his own hands." The assured shot himself "in a momentary paroxysm," as was alleged, "of moral insanity, which subjected his will and impelled the homicide beyond the power of self-control or successful resistance." The verdict was for the plaintiff, and on appeal a new trial was ordered, but the court was equally divided on the grounds of the

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decision. ROBERTSON, J., with whom PETERS, J., concurred, held that the conditions of avoidance contemplated a rational mind and a presiding will, and that suicide in the absence of these would not defeat the policy. WILLIAMS, C. J., with whom HARRIS, J., concurred, took substantially the same ground as was taken in *Dean v. American Mutual Life Insurance Co.*, *supra*. If the force and accuracy of the opinions were taken as decisive of the case, we have little doubt ROBERTSON, J., would have carried the court, for, to say nothing of the arguments of the chief justice, his "facts" are exceedingly erroneous. For instance, he includes CRESSWELL among the judges who decided *Borradale v. Hunter*, and gives the vote in *Clift v. Schwabe*, as "five to two," whereas it was four to two, and speaks of *Breasted v. Farmers' Loan & Trust Co.*, 4 Hill, 74, above cited, as decided by "the senate of New York sitting as a court of errors," and speaks of "the short, unphilosophical and weak argumentation of this political body," when, in fact, that decision was made by the supreme court, and the opinion delivered by Chief Justice NELSON, now on the United States supreme court bench.

The charge of MCKENNA, J., in the case of *Nimick v. Mutual Benefit Life Insurance Co.* (1870), Bigelow's Life and Accident Insurance Reports, 689, United States circuit court, western district, Pennsylvania, was substantially, and most of it literally, in the language of *Dean v. The American Mutual Life Insurance Co.* Its conclusion was as follows: "If, however, you believe from the evidence that he (the assured) committed self-destruction; that he intended to destroy his life, and comprehended the physical nature and consequence of his acts, the plaintiffs are not entitled to recover."

It is quite evident that the preponderance of the authorities is in favor of the proposition that voluntary suicide avoids a life policy containing the usual provisos. Precisely what is meant by "voluntary suicide" is not very apparent, but we infer from the language of the opinions, that the term is intended to include all suicides not perpetrated in the "madness of delirium." This is a construction severely strict, in favor of the companies. The proviso avoiding the policy in cases of suicide, etc., is the language of the company, and is also in the nature of a forfeiture, and should for both reasons be construed, if its meaning is doubtful, in favor of the assured. The term "suicide," which is agreed to be synonymous with "die by his own hand," has a technical legal meaning, and there is no inconsistency in holding that the parties use it in such a contract according to that meaning. "Self-slaughter by an insane man or a lunatic is not an act of suicide, within the meaning of the law." 4 Black. Com. 189; 1 Hale's P. C. 411.

There is no injustice to insurers in holding them to a strict construction of their policies. If they do not choose to be responsible in case of suicide from any cause, they can easily avoid it by excepting self-slaughter, whether by a sane or insane person. They insure against disease, and where, in the absence of explicit exceptions, death results from any disease, whether of mind or body, they should be held liable. In the tables of mortality which formed the basis of the calculation upon which the policy is founded, deaths from suicide are included as well as deaths from other causes, and the rates are established to cover this as well as other risks. The assured, therefore, pays an amount sufficient to include the risk of suicide, but the courts, by a strained interpretation, deprive him of the benefit of that payment, even when the suicide results from disease.

The arguments advanced in *Dean v. American Mutual Life Insurance Co.*, and in most of the kindred decisions, that to hold that suicide did not avoid the policy will have a tendency to encourage men to insure and then commit suicide, for the benefit of their friends, is too absurd to receive attention. But suppose it would have the tendency to lead men into such extraordinary speculations, what has the court to do with it? That is the business of insurers, certainly, and one which they know well how to look to.—REP.

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(102 Mass. 230.)

Fire insurance policy — entry of a foreclosure.

A policy of fire insurance on personal property contained a proviso that "if the title of the property is transferred or changed" "this policy shall be void; and the entry of a foreclosure of a mortgage" "shall be deemed an alienation of the property, and this company shall not be holden for loss or damage thereafter." The insured property was mortgaged at the time the insurance was affected, and notice of foreclosure had been duly served, certified and recorded when the fire occurred. *Held*, that the policy was avoided.

ACTION on an insurance policy. The facts appear in the opinion.

A. L. Soule for defendants (appellants).

N. A. Leonard, for plaintiff.

AMES, J. The plaintiff, as assignee in bankruptcy of John C. Spooner, claims in this action the sum of \$2,000, as the amount due from the defendants for the loss by fire of certain personal property of the bankrupt, upon which they had granted a policy of insurance for one year from January 1, 1868. The policy contains, among its various conditions, a stipulation in these words: "If the title of the property is transferred or changed" "this policy shall be void; and the entry of a foreclosure of a mortgage" "shall be deemed an alienation of the property, and this company shall not be holden for loss or damage thereafter." The insured property had previously, namely, on August 15, 1867, been mortgaged by Spooner to one L. C. Smith, as security for Spooner's note of that date for \$5,000, payable in six months, with interest annually. Whether the defendants had any notice of the existence of this mortgage, other than such as is implied from its registration, did not appear and may not be material. On the 4th day of March following, the note having become due and remaining unpaid, Smith gave notice to Spooner of his intention to foreclose the mortgage, which notice was duly served, certified and recorded, according to the provisions of the general statutes, chapter 151, sections 6 and 7. On the first day of April following, the insured property was totally destroyed by fire.

What we are to understand by the expression, "the entry of a foreclosure of a mortgage," which, according to the terms of the contract, "shall be deemed an alienation of the property," after which the defendants "shall not be holden for loss or damage?"

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It is a somewhat peculiar form of expression, not strictly and technically accurate, perhaps, but to be interpreted in such a manner as to carry out the true intent of the parties, so far as that intent is discoverable. In the case of a mortgage upon real estate, the mortgagee, on breach of condition, may enter for the purpose of foreclosure; and, although his title may become absolute by mere lapse of time, no other entry or formality may be required on his part; and there is nothing in any public record, or in any proceeding, which can literally be said to be an entry of foreclosure. In the case also of a mortgage of personal property, the mortgagee gives notice of his intention to foreclose, in the form prescribed by statute, and his title afterward may become absolute without any further act or ceremony on his part. He cannot be said to enter upon the property, nor can it in a literal sense be said that there is an entry of foreclosure. In both cases, the first step toward foreclosure is the manifestation of the intent to foreclose, which is to be indicated in such manner as the law points out, accompanied with a formal registration in the public records. It is very manifest, as we think, that the words "the entry of a foreclosure," as used in the policy, are not to be interpreted as meaning exactly the same thing as a consummated and finished foreclosure. The policy provides not merely for the transfer, but the change of title, and the insurers may very naturally have considered an entry of foreclosure as a very material change in the title of the assured, and in his relation to the property. The parties, in their contract, have taken pains to avoid saying simply that "the foreclosure of a mortgage" shall be deemed an alienation. There would be no occasion for them to say that, inasmuch as the law would plainly have said it for them. The meaning of the policy, in our judgment, is, that something short of an actual and complete foreclosure shall be considered for the purposes of their contract, as a transfer or change of title, and that an entry for foreclosure, or an act which of itself, and without any further formality or process on the part of the mortgagee, will deprive the assured of all right and title in the property, unless he pay the debt, shall be deemed sufficient to terminate the risk. The defendants might well be unwilling to continue to insure property which is so situated that its destruction by fire might be the easiest or only way to make it beneficial to the assured.

In this view of the case, the other exceptions urged by the defendants do not require to be considered.

Exceptions sustained.

BILLINGS v. WORCESTER, appellants.

(108 Mass. 329.)

Liability of town for defective sidewalk.

In an action against a city for injuries sustained by the plaintiff by slipping upon ice which had formed on the sidewalk in consequence of water dripping from a defective conductor, or the eaves of a building, the jury were instructed that the icy condition of the sidewalk, if produced from the operation of general causes, as by reason of atmospheric changes, would not constitute a defect for which the city would be liable; but that the same condition of the sidewalk, if produced from some local cause, as by a defective sewer, or by water dripping from the edge of a roof, might constitute a defect for which the city would be liable; that the question of defect depended upon whether the condition of the sidewalk was produced by general causes affecting a whole neighborhood alike, or by some special local cause affecting a particular portion of the sidewalk. *Held*, that the distinction thus made was error, and that the question of defect must be determined by the condition of the sidewalk itself, in respect to that particular, which is alleged to have caused the injury.

ACTION in tort to recover damages from the city of Worcester, for injuries sustained by the plaintiff. The injury complained of was occasioned by plaintiff slipping on the sidewalk, on the evening of December 15, 1868, ice having accumulated on the walk from a defective conductor or the eaves of a building adjacent to that portion of the walk where plaintiff fell and was injured. The trial was had before AMES, J. Defendants requested the court to charge "that the city was not liable for the construction of the conductor, because it was outside of the location of the street, and the condition of the building, whatever it was, was no evidence of notice of a defect in the street, although that condition was the cause that produced the defect; that if the city had notice of a cause outside the location of the street, which was likely to produce a defect in the street, that was no notice of the defect itself; and that the city must have had reasonable notice of the defect itself, or it must have existed twenty-four hours, and it was not material that the defendants had notice of a cause likely to produce the defect, or whatever the cause might be."

"The judge did not give these instructions in terms, but instruc-

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ted the jury on these points substantially as follows: If any defect or want of repair in the conductor or the eaves of the building caused the water, by alternate thawing and freezing, to drip upon the sidewalk and form ice there, so as to make a portion of the sidewalk unsafe, and it had continued so for more than twenty-four hours, it would be a defect for which the defendants might become responsible. If, from the operation of general causes, as by reason of atmospheric changes, snow falls and melts and then freezes, or rain falls and freezes, covering all the land with a coating of ice, that is not a defect for which a town or city is liable. But if ice is formed by some local cause, as by a defect in some spout or sewer, or if water drips down from the edge of a roof or flows from a defectively constructed building, by the side of the street, and forms ice upon some spot in the sidewalk, so that a person walking and coming unexpectedly upon a smooth piece of ice so formed would be exposed to the danger of slipping and falling, it might be a defect for which the city would be liable. In other words, ice may be a defect, even though not broken up into unevenness. It depends upon whether the result is produced by general causes affecting a whole town or neighborhood alike, or by some defect, malconstruction, or want of repair in the street, or some building or structure near to or by the side of it, and affecting some particular portion of the sidewalk and rendering it unsafe." Verdict for the plaintiff in the sum of \$1,080; and the defendants appealed.

W. W. Rice & F. P. Goulding, for defendants (appellants).

G. F. Verry, for plaintiff.

WELLS, J. The question raised upon the instructions excepted to is substantially this: Whether the same condition of a street or sidewalk, which, if produced "from the operation of general causes, as by reason of atmospheric changes," resulting in a slippery state of the surface, would not be a defect, may be shown by proof and found by a jury to be in fact a defect, for which the city or town is liable, "if the ice is formed by some local cause," such as those enumerated by the judge at the trial. The jury were instructed that smooth ice, "not broken up in unevenness," may be a defect, and that the question of defect or no defect, in such case, would depend upon the manner in which the result, or condition of the street, was produced,

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whether by general causes affecting a whole town or neighborhood alike, or by some special local cause.

There are expressions, in some of the decisions upon this subject, which seem to give color to this distinction. But a majority of the court are satisfied that it is a distinction which will not bear the test of close scrutiny. The liability of towns for defects in highways is a special and peculiar one. It is not based upon the rules of reasonable care upon which individual liability usually depends. Except so far as it is modified, in relation to defects that have not existed twenty-four hours, by the condition that there must have been reasonable notice of the defect, the liability of the town is not at all affected by the question of its diligence or negligence. The existence of the defect, and the lapse of twenty-four hours, or a less time with reasonable notice of the defect, complete the conditions of liability. It is of no consequence whether that which constitutes the defect arose from causes for which the town is responsible, and over which it had control, or from natural and general causes, such as storms, floods, hurricanes, accident, or gradual and imperceptible change and decay. The fault for which the town is chargeable consists in permitting the defect to remain, not in causing it to exist. It is not enough, for the exemption of the town, that it has exercised reasonable care, or even the utmost diligence to make its ways safe, if they are in fact not so. The statute is peremptory. It contains no qualification except that as to the time of the continuance of the defect. It permits no excuse, not even "the act of God or the public enemy." Obstructions from snow and ice, and, indeed, in the open country, most defects in the highways, are produced by cases which are natural and of general operation. When an injury is suffered, a town is not allowed to exonerate itself from responsibility by showing that the defect which occasioned it arose from such causes, beyond its control and without any negligence on the part of its officers. On the other hand, if the injury happened by reason of that which was not in itself a defect, the town cannot be made liable, whatever may be the proof as to the manner in which the condition of the way became such as it was.

The ground upon which it has been held that the mere fact that the surface of a well-constructed street or sidewalk is rendered smooth and slippery by moisture and frost does not constitute a defect is, that such a condition is so inevitable, so necessarily an incident to the character of our climate, so dependent upon the

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changes of temperature from day to day and from hour to hour, that it cannot be supposed to have been the intention of the legislature to cast upon the towns a duty so impossible of performance, or a burden from which the highest degree of diligence do so little to protect them. *Stanton v. Springfield*, 12 Allen, 566; *Luther v. Worcester*, 97 Mass. 268. The application of those decisions must not be limited by the reasons which led to the conclusion. Particular instances are not to be excepted from such a rule of law because all the reasons suggested for its adoption do not exist in those instances.

The case of *Nason v. Boston*, 14 Allen, 508, is strongly in point. There a special local cause was relied on as contributing to the condition of the sidewalk, which was alleged to be unsafe. That special cause was within the limits of the street, and in a measure under the control of the city. It affected that particular portion of the sidewalk only. The judge at the trial made substantially the same distinction as was made by the instructions in the present case. But it was held that the responsibility of the city must be determined solely in reference to the condition of the sidewalk, upon which the defect was alleged to have been, which caused the injury. Neither the special cause nor the limited effect was regarded as changing the principle to be applied. Indeed, that which produced the slipperiness in both cases, frost, is neither special as a cause, nor is its operation local or limited, but general.

In the case of *Hall v. Lowell*, 10 Cush. 260, there was evidence of an accumulation of ice, the character and thickness of which was in dispute; and the case having been submitted to the jury "upon instructions satisfactory to both parties," the only question was upon the sufficiency of the evidence to sustain the verdict.

In *Shea v. Lowell*, 8 Allen, 136, the question to which the exceptions related was, not whether the ice was of such a character as to constitute a defect, but whether the defendant had used sufficient care and diligence to remove the ice, or to protect the public from it. As that was one of the grounds of defense relied on, and set up in the answer, the city could not well object to testimony offered to meet it.

Payne v. Lowell, 10 Allen, 147, differs from *Shea v. Lowell* only in that the question arose upon the competency of certain evidence offered by the defendants to sustain the defense of reasonable diligence. The court remark that "the evidence excluded had no bearing upon the question whether there was a defect in the way."

The result of all the decisions is, that the question of defect must be determined by the condition of the way itself in respect to that particular which is alleged to have caused the injury complained of; that the question of notice to the town, and of fault or negligence, or the contrary, on the part of the town, are involved only in reference to that particular defect or condition complained of, and, even as to that, only to a very limited degree; that snow and ice in the streets, or upon sidewalks, are not defects merely because they make it slippery.

As the jury were authorized by the instructions to find that ice, not otherwise a defect by reason of any thing in its form or character besides that which is inseparable from ice, was a defect in this case, if they also found that it was produced or deposited upon the sidewalk by reason of some malconstruction or want of repair in a building or structure by the side of or near to the street, and affecting that particular portion of the sidewalk only, a majority of the court are of opinion that the verdict must be set aside. The incorrectness of the instructions cannot be helped by any supposition that the jury, by means of their view, or upon any evidence in the case, may have found that there was in fact a defect of a character different from that which the instructions apply to.

The instructions asked for, to the effect that notice of a cause outside, which was likely to produce a defect in the street, is no notice of the defect itself; and that the existence of such a cause for twenty-four hours is not equivalent to the existence of the defect for twenty-four hours, state a correct rule of law; but the instructions given to the jury required them to find that the defective condition which caused the injury had continued so for more than twenty-four hours.

COLT, J. The jury were told in this case, substantially, that if from local causes a particular portion of the sidewalk was rendered unsafe by the formation there of smooth ice, and it had continued so for more than twenty-four hours, it might be a defect for which a city or town would be liable; that such defect might arise from malconstruction, or want of repair in the street, or in some structure by the side of the street, affecting some particular portion of the walk, and rendering it unsafe. Instructions appropriate to other parts of the case were given, which were not objected to and are not reported. The action was for an injury occasioned by a defect

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in the highway, and the jury, under these instructions, must have found that the plaintiff, while in the exercise of due care on her part, was injured solely by such defect. They have declared that smooth ice, under the conditions disclosed here, is a defect in the highway. And the case is brought, in my opinion, within all the statutory conditions fixing the liability of cities and towns in these cases.

Whenever an injury is occasioned to the traveler solely by the condition of the highway, either in respect to its construction, or want of repair, or obstructions suffered to remain upon its surface, the question whether such condition amounts to a defect is ordinarily for the jury alone. It is, under the statutes, a practical question, even more appropriate to the jury than the question of due care. The statutes do not define what shall be a defect. The standard established is, that highways shall be safe and convenient. The rule given is, from the necessity of the case, flexible, and without uniformity in its practical application. It is different in different localities and under different circumstances. It is affected by the amount and nature of the travel to be accommodated, by the character of the country through which the road passes, and the expense and difficulty of constructing and maintaining it. It is one thing in the city and another in the country. It is less stringent in winter and spring, when travel is obstructed by snow and frost and mud, than in summer, when all roads are hard and dry. As a practical question to be settled by the jury, the liability of the town or city will always be affected by the diligence exercised by it, or the negligence with which it is chargeable. It was not the intention of the statute to impose a liability for that which it is impossible to prevent or remedy. It is indeed peremptory; and the town is liable, if a defect has actually existed for the required time, even though produced by causes against which human foresight could not guard. But in such cases, permitting the defect to remain more than twenty-four hours, or not seasonably warning the traveler so that he may avoid the danger, is a dereliction of duty which makes the town liable. In most cases, upon the question what is a safe and convenient highway, the jury will be influenced by the knowledge of what it is reasonably practicable to do to adopt a road to existing conditions and existing demands of travel. In view of these considerations, it is manifest also that the degree of care which is required of the traveler varies with the varying standard

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of what is safe and convenient. He must regard the circumstances suggested, and regulate his care by what he has a right to expect as to the condition of the road. To a man thus cautious the way may be safe, though in fact dangerous as compared with other roads, or with the same road at another season of the year or under more favorable conditions of the weather. If, for instance, the whole surface of the walk becomes, by the changes in our climate, covered with slippery ice, the highway would be made unsafe to a person passing incautiously over it, yet, if well constructed and in good repair, there would be no defect within the meaning of the statute; while a spot of ice, presenting only a smooth and glare surface, if suffered to gather and remain upon a sidewalk, might be justly considered as creating a defect which makes it at that point unsafe and inconvenient, within the meaning of the statute. In one case, the traveler is put upon his guard; and in the other, not. In one, it is impossible to remedy the unsafe condition; and in the other, the danger may be prevented or removed, or due notice of its existence given. The questions, what is due care, and what is a defect, in a given case, must be considered with reference to and as reciprocally affecting each other. If the plaintiff produces any evidence upon the two propositions upon which his case depends, he has the right to submit them to the jury. It is not possible to define either as matter of law, without introducing uncertainty and confusion.

In the case at bar, I do not understand the instructions to have made the safety of the way depend upon the producing cause. All the instructions must be taken together and applied to the facts. The jury were distinctly told that the cause must affect the particular portion of the sidewalk, and render it unsafe, as distinguished from those influences of the climate which affect the whole surface of the country. The condition of the way in question consisted of a deposit of ice on the walk, more or less permanent, and entirely local in its character. Simple expedients, easily applied, it seems, would have prevented or removed it. It is not material whether it was caused by defective drainage within the limits of the street, the want of a proper culvert, as in *Stone v. Hubbardston*, 100 Mass. 49, or by neglect to use means adapted to prevent the flow of water from adjoining premises. The jury themselves visited and viewed the locality, and, upon all the evidence, they may have considered it practically as unsafe and inconvenient as if an excavation had been left open, or a tree had fallen across it. The street and sidewalks

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generally, on the night in question, were free from ice and snow; and the plaintiff came unexpectedly upon it, using due care.

I cannot but think, that, upon sound principles of law applicable to this statute liability of towns, the verdict in this case ought not to be set aside. In doing it, the court must go a step beyond the line established by any former decision.

In *Stanton v. Springfield*, 12 Allen, 566, slippery ice was produced by sudden changes of the weather, affecting the whole region, upon a sidewalk otherwise well constructed. And the court say that "it could never have been intended by the legislature to impose upon the towns and cities of the commonwealth a responsibility so extensive, or that the phrase 'safe and convenient for travelers' should receive such an interpretation. It would require of all the towns an examination of all their roads so incessant and minute, and the application of an efficient remedy would be so laborious and expensive, that it would be manifestly unreasonable to require or expect it. The freezing mist of a single night may glaze over the whole territory of a town. The formation of thin but slippery ice in our climate is an effect which may be so suddenly and extensively produced, and which may continue or be renewed for such a length of time, that it would be extremely difficult, if not impossible, for towns to make adequate provision against it."

The plain meaning of this language is, that the towns and cities of the commonwealth are not called upon to perform impossibilities. They are not required to resist and counteract the general effects of the climate, and the sudden changes of weather and alternations of temperature which affect the whole territory and surface of a town or a county alike, and which no human diligence could be expected to prevent or to remedy. It is clear that the learned judge who delivered the opinion in that case intended to exclude those cases where the alleged defect is one which it was reasonably practicable to prevent or remedy; for he further says that "there is no question that a way may be defective or out of repair, within the meaning of the statute, by reason of ice or snow upon it." It may be "so exposed to the formation of ice as to make passing over it in winter especially dangerous." The decision in that case, as in all others, is properly limited by the facts to which it was applied, and cannot be wisely extended to this case.

Hutchins v. Boston, 12 Allen, 571, note, and 97 Mass. 272, note, and *Johnson v. Lowell*, 12 Allen, 572, note, were held to fall within

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the principle of *Stanton v. Springfield*, and involved the same question.

The case of *Nason v. Boston*, 14 Allen, 508, contained some additional elements, but in the opinion of the court it was brought within the scope of *Stanton v. Springfield*. It appeared that snow was loosened and thrown up by the wheels of the horse cars passing in the street, and then carried upon the sidewalk by adhering to the feet of those who crossed the street, and was there trodden down; and that ice was formed in that manner upon the sidewalk. This was held not to be a defect for which the city could be held accountable. There was nothing in this case to show that there was any unevenness, or any thing like a ridge or mass of ice. There was also nothing to show that ice was formed at that particular spot by any thing except the ordinary stress of weather and the ordinary incidents of travel, or that the state of facts at that place differed in any essential particular from other street crossings in general. That snow in winter time should adhere to the feet of passengers crossing the streets, and should be shaken off when they reach the sidewalk, and there be trodden down compactly, may be considered as one of the ordinary incidents of the use of the streets. Such would probably be the state of things, with no difference except in degree, at that season of the year, at all the street corners, in all the cities of the commonwealth. That case, therefore, was not one in which it could be said that there was a special or peculiar cause for the formation of ice at the place of the accident, as compared with street corners generally. The opinion of the court in that case is carefully guarded. It is there said, that "the liability of the city must rest upon some ground of fault or neglect on the part of its officers who are charged with the care of the streets. Such fault or neglect is no more involved in the carrying of snow upon the sidewalk by the feet of travelers than in its fall there from the clouds." "This condition, so inevitable an incident of our climate, does not of itself render the city liable, without some other element or evidence of fault or neglect." In these well-chosen words a sound proposition is stated, which is also recognized and approved in *Luther v. Worcester*, 97 Mass. 268.

The judgment in the case of *Nason v. Boston*, in my opinion, must be considered as marking the extreme limit to which the court should go in that direction. It does not reach the present case. Both cases cited turn upon the distinction between effects produced

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by causes operating suddenly and extensively, and which may continue or be renewed for such length of time that the highest diligence cannot prevent or remedy them, and those preventable defects which result from special and local causes, and against which it is practicable for towns to make adequate provision.

It is not necessary further to point out the additional evidence and elements of neglect, which appear in the present case and distinguish it from each of the others.

I regret that I feel compelled to disagree with a majority of my associates, in the judgment to which they come. I am authorized by Mr. Justice AMES to say that he joins in the dissent.

Exceptions sustained.

GOODRICH, appellant, v. WESTON.

(108 Mass. 302.)

Evidence — copies of lost letters.

A sworn copy of a letter-press copy of a lost letter is competent as evidence of the contents of the letter, without producing the letter-press copy.

ACTION on contract for work and materials. At the trial the defendant gave notice to the plaintiffs to produce all letters received from him, whereupon plaintiffs did so produce all that could be found. The defendant then offered copies of several other letters which he testified to have deposited in the post-office, post-paid to plaintiffs. Defendant further testified that the copies offered had been made by his wife from copies of the original letters made by a machine press, in a letter-book, and that he had compared the two sets of copies and had found them correct. During the cross-examination of the defendant, his counsel offered to send for the letter-book, but no notice was taken of the offer, and the letter-book was not sent for or produced. The plaintiffs objected to the admission of the copies on the ground that the letter-book would have been better evidence of the originals. The objection was overruled. Verdict was rendered for the defendant, and the plaintiffs appealed.

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C. H. B. Snow, for the plaintiffs (appellant).

A party in possession of better evidence should be required to produce it. 1 Greenl. Ev., § 84, and cases cited; *Mortimer v. McCollan*, 6 M. & W. 58, 69; *Brewster v. Sewell*, 3 B. & Ald. 296; *Brown v. Providence, Warren & Bristol R. R. Co.*, 5 Gray, 35. A copy of a copy is not admissible in evidence under circumstances like the present. 2 Phil. Ev. (4th Am. ed.) 537; 1 Taylor on Ev., § 497; *Liebman v. Pooley*, 1 Stark. 167; *Everingham v. Roundell*, 2 Mood. & Rob. 138; *Ryves v. Braddell*, Irish Term R. 184; *Holland v. Reeves*, 7 C. & P. 36; *Morris v. Vanderen*, 1 Dall. 64; *Winn v. Patterson*, 9 Pet. 633.

G. A. Torrey, for the defendant.

WELLS, J. The defendant, by giving notice to produce the original letters written by him to the plaintiffs, had entitled himself to prove their contents by secondary evidence. He produced copies made by his wife from his letter-book, into which the originals had been first copied by a machine press, and testified that he had compared these copies with those in the letter-book and that they were correct. He also testified that he deposited the originals in the post-office, directed to the plaintiffs. The offer to send for the letter-book, and produce it in court if desired, must be taken at least to relieve the defendant from any suspicion that the letter-book was improperly kept back. The objection to the admissibility of the copies stands, therefore, strictly upon the legal ground stated, namely, "that they were not copies of the originals, and that the letter-book itself would be the best evidence."

Whenever a copy of a record or document is itself made original or primary evidence, the rule is clear and well settled that it must be a copy made directly from or compared with the original. If the first copy be lost, or in the hands of the opposite party, so long as another may be attained from the same source, no ground can be laid for resorting to evidence of an inferior or secondary character. The admission of a transcript from the record of a deed or other private writing, for the record of which provision is made by law, is not an exception to, but only a modification of, the same rule. But when the source of original evidence is exhausted, and resort is properly had to secondary proof, the contents of private writings may be proved like any other fact, by indirect evidence. The ad-

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missibility of evidence offered for this purpose must depend upon its legitimate tendency to prove the facts sought to be proved, and not upon the comparative weight or value of one or another form of proof. The jury will judge of its weight, and may give due consideration to the fact that a less satisfactory form of proof is offered while a more satisfactory one exists and is withheld, or not produced when it might have been readily obtained. But there are no degrees of legal distinction in this class of evidence. Although there has been much diversity of practice, and the decisions are far from uniform, more frequently turning upon special circumstances and facts than upon a general principle, the tendency of authority is, as we think, toward the establishment of the rule here stated. 2 Phil. Ev. (4th Am. ed.) 568; 1 Greenl. Ev., §§ 84, 582; *Stetson v. Gulliver*, 2 Cush. 494; *Robertson v. Lynch*, 18 Johns. 451; *Winn v. Patterson*, 9 Pet. 663; *Brown v. Woodman*, 6 C. & P. 206; *Doe v. Ross*, 7 M. & W. 102.

In this case the letter-book, if produced, would have been only secondary evidence. We are satisfied that the copies, admitted by the court below, were sufficiently verified to justify their admission as competent evidence of the contents of the original letters.

Exceptions overruled.

SWEAT V. SHUMWAY, appellant.

(102 Mass. 385.)

Sale — Warranty — Parol evidence.

The plaintiffs contracted to manufacture and deliver to the defendant "all the horn chains they manufacture." The chains manufactured and delivered were composed of round and oval links, the round links being hoof and the oval links being horn; and in an action to recover the contract price, *held* (1) that the words "all the horn chains they manufacture" did not imply a warranty that the chains should be made wholly of horn, but that they should be the article known in the market as "horn chains; (2) that the contract called for articles of a fair merchantable quality and of good workmanship, but not for articles of the first quality.

Parol evidence is admissible for the purpose of applying the terms of a written contract to the subject-matter.

ACTION on contract for goods sold and delivered. By the contract set out at the trial in the superior court, the plaintiffs had agreed

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to "manufacture and deliver" to the defendant "all the horn chains they manufacture." A large part of the chains manufactured and delivered under this contract were composed of round links and oval links, the round links being hoof and the oval links horn. The defendant alleged that the articles delivered were inferior in workmanship and material to that called for by the contract. The plaintiffs showed, under defendant's objection, that they had been manufacturing such chains before the contract was made; that they were known in market as "horn chains;" and that the defendant knew at the time the contract was made that the chains contracted for were to be partly of hoof. It then appeared by defendant's testimony, on cross-examination, that the chains had been resold by him at ten per cent advance on the contract price. The defendant also offered to show the price of different qualities of chains in the market but the offers were rejected by the court.

Lincoln, one of defendant's witnesses, was asked on cross-examination whether he did not offer Sweat, one of the plaintiffs, \$500 for the contract in question, which he, Sweat, had retained in his possession after selling out his interest under the contract to the other plaintiffs; and he replied in the negative. Sweat afterward testified, under defendant's objection, that Lincoln did make the offer, but that he refused it. Sweat was further allowed to testify, under defendant's objection, that he had "experimented by putting hoof and horn rings together; almost invariably the horn ring would break. These horn rings were not smooth. I continued to send them to market until there was no demand." The defendant's counsel contended that the words "horn chains," in the contract, were an implied warranty that they should be made entirely of horn, also that the contract called for chains of the first quality, notwithstanding the nature of the demand for the chains in the market generally, and the fact that the chains made and delivered to plaintiffs were merchantable; and requested instructions accordingly.

The judge instructed the jury, "in substance, that the burden of proof was upon the plaintiffs to satisfy them that they had in good faith complied with the contract with the defendant, and delivered to him articles of the kind and quality called for by his contract; that the expression in the contract, 'horn chains,' does not necessarily import a warranty that the chains should be made wholly of horn, but if there was an article called and known in the market as 'horn chains,' made partly of horn and partly of hoof, and the

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parties intended this article when they entered into the contract, it would be a compliance with the contract if the plaintiffs furnished such article; that, there being no stipulation in the contract that the horn chains were to be of the first quality, the law does not imply a warranty that they should be of the first quality, but does imply a warranty that they should be of a fair merchantable quality and of good workmanship; and that, if the plaintiffs had not delivered articles of the kind and quality called for by the contract, the defendant was not obliged to receive or pay for them, and the plaintiffs could not recover for such articles."

Verdict for the plaintiffs for the full amount claimed. Defendant appealed.

N. St. J. Green, for defendant (appellant).

G. F. Hoar, for plaintiff.

COLT, J. It is a rule of interpretation, that the intention of the parties to a contract is to be ascertained by applying its terms to the subject-matter. The admission of parol testimony for such purpose does not infringe upon the rule which makes a written instrument the proper and only evidence of the agreement contained in it. Thus, for the purpose of identifying the subject-matter to which the written contract relates, parol testimony of that which was in the minds of the parties, and to which their attention was directed at the time, may be given. It may be shown that a sample, to which the terms of the contract are applicable, was exhibited or referred to in the negotiation, and other statements of the parties then made may be resorted to. The sense in which the parties understood and used the terms expressed in the writing is thus best ascertained. Accordingly, it has been recently held, in an action upon a written contract relating to advertising charts, that verbal representations as to the material of which the chart was to be made and the manner in which it would be published, although promissory in their character, were admissible. *Stoops v. Smith*, 100 Mass. 63; 1 Am. Rep. 85; *Hogins v. Plympton*, 11 Pick. 97; *Miller v. Stevens*, 100 Mass. 518; 1 Am. Rep. 139.

In the present case the plaintiffs contracted with the defendant for the manufacture of articles described as "all the horn chains they manufacture." There was no express warranty as to quality

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or description; and the inquiry at the trial was, what article the words "horn chains manufactured" by the plaintiffs were understood by the parties to mean. The defendant contended that the words implied a warranty that the chains should be made wholly of horn, and that there was a failure to comply if part of the links were made of hoof; but the ruling of the court was, that if there was an article called and known in the market as horn chains, made partly of horn and partly of hoof, and the parties intended this article when they entered into the contract, it was sufficient. This ruling was right. There are many articles which are named from one of several different materials of which they are made. A contract, for example, to furnish gold watches or mahogany furniture would not be construed to require the whole watch to be gold, or the whole piece of furniture to be mahogany. In the admission of the evidence offered by the plaintiffs on this point, the true rule was applied by the court. And this disposes of very many of the numerous exceptions, of a similar nature, which appear upon this record. It would be unprofitable to examine in detail the whole class to which it applies.

The further instruction of the court, that the law implied that the articles called for by the contract should be of fair merchantable quality and of good workmanship, but not that they should be of first quality, was sufficiently favorable to the defendant. It was left to the jury to find what quality and kind the plaintiffs were obliged to deliver under the contract. *Mixer v. Coburn*, 11 Metc. 559. All the offers of the defendant to show the price of different qualities of chains in the market were properly rejected. No warranty can be inferred from price paid, and the plaintiff is entitled to the full benefit of his contract, without reference to the market price at the time or afterward, or the course of the trade and manufacture of chains. The price in the market is not an element from which to determine whether the chains were up to the contract, and did not become admissible for such purpose, when offered, after testimony, on cross-examination of the defendant, that he sold the chains, received of the plaintiffs, at an advance on the contract price.

Upon cross-examination of the defendant's witness Lincoln, he denied any attempt improperly to obtain the written contract in question from one of the plaintiffs. The subsequent examination of the same plaintiff, to show that such attempt was made, was

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properly allowed for the purpose of showing such a bias as would affect the credit of his testimony. *Day v. Stickney*, 14 Allen, 255.

The testimony of Sweat as to the relative strength of hoof and horn rings, from knowledge which he had derived by actual experiment, was not objectionable. It was the statement of results which he had observed as matters of fact, and had some tendency to enlighten the jury upon the question at issue.

Other exceptions to the admission and rejection of evidence taken at the trial were not pressed at the argument, and need no notice here. The instructions given to the jury were all that the case required, and are not open to the defendant's exception; and the instructions requested were properly refused.

Exceptions overruled.

FORBES v. HOWE, appellant.

(103 Mass. 497.)

Fraudulent mortgage — bankruptcy.

A manufacturer of bricks gave a mortgage upon bricks to secure an existing debt and future advances. The mortgaged property was subsequently sold and delivered with the permission of the mortgagees; and a new mortgage was given on other bricks expressed to be in consideration of the release of the claim of the prior mortgage. The manufacturer was, at the time of giving the new mortgage, insolvent in fact, although he did not file his petition in bankruptcy until a month later. In an action by the assignees in bankruptcy to recover for the property conveyed under this last mortgage, the jury found an intention on the part of the mortgagor to give a preference to the mortgagees, and also that the mortgagees had reasonable cause to believe the insolvency and such intention of the mortgagor. *Held*, that the new mortgage must be regarded as a new security, and not a mere substitution of securities, and that it was void as against the assignees in bankruptcy, under the United States bankrupt act, section 85.

ACTION by the assignees in bankruptcy of Josselyn against Howe & Upham, to recover for the conversion of personal property conveyed under a mortgage, dated October 1, 1867, alleged to be void under the United States bankrupt act. U. S. Stats. 1867, ch. 176;

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14 U. S. Stata. at Large, 517. Josselyn was engaged in the business of brick making, in 1867, and in order to obtain credit of Howe & Upham, for merchandise and wood, gave them a mortgage upon a kiln of bricks. In August, 1867, the kiln was burned and part sold; a new kiln was prepared, and upon this, and the remnant of the bricks of the old kiln, another mortgage was given upon the same terms and conditions as the former, as security for the debt already existing and for future advances. October 1, 1867, the second kiln was burned, and was part sold and delivered but not paid for; and the mortgagees, in order that Josselyn might receive the pay therefor, released their claim under the mortgage and took the mortgage in question. On November 11, 1867, Josselyn filed a petition in bankruptcy. The trial was held before AMES, J., who allowed a bill of exceptions, of which the following only is important as containing the offers of evidence and instructions, to which the attention of the court is directed in the opinion. The plaintiffs, under defendants' objection, put in evidence tending to prove that the financial reputation and condition of Josselyn were bad during the fall of 1866.

The defendants asked the judge to rule as follows: "1. The plaintiffs must prove that the debtor was insolvent at the time of making the conveyance; that he made it with a view of giving a preference to a preëxisting creditor; that he had at the time reasonable cause to believe himself insolvent; that the creditor, at the time of receiving the conveyance, had reasonable cause to believe that the debtor was insolvent, and had also reasonable cause to believe that the debtor intended the conveyance as a fraudulent preference of him against the provisions of the bankrupt act. 2. If the mortgage in question was given in consideration that Upham would release his claim upon other property secured by the mortgage of August 21, and, at the request of Josselyn, in order to enable Josselyn to give title to and recover pay for property, described in that mortgage, which he had sold, and the transaction was merely the substitution of one security for another, then the giving of this last mortgage was not an unlawful preference, even though Josselyn was insolvent, and the mortgagees had reasonable cause to believe it. 3. If the mortgage was made in good faith by Josselyn, solely with intention to obtain means for the continued prosecution of his business, and with the intention and expectation that he would be able to do so, and with no intent on his part to give a preference, the

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conveyance would not be invalidated although the parties intended that the mortgage should also operate as security for the then existing debt. 4. Although the jury are authorized to infer the intent to prefer from the fact of preference, yet they are not at liberty to do so if the evidence of the facts and circumstances attending the transaction leads to the conclusion that this mortgage was given in the usual and ordinary course of the business of the parties, and not with the intent to prefer, but as a substitution of one security for another released and given up."

The judge refused to rule as prayed for, except as to the defendants' first proposition, which was given substantially as prayed for; but gave the following rulings: "If the understanding was, under the mortgage of August 21, that Josselyn should remain in possession, and be allowed to manufacture bricks and to sell them from time to time, as he should find convenient, and, after manufacturing an additional quantity of bricks, should make a new mortgage including such additional bricks, such agreement on his part would be a mere executory contract, and not a conveyance. If such new mortgage were to be afterward given, its validity would depend entirely upon the circumstances under which it was made, and the state of things existing at that time. If such new mortgage covered, or was intended to secure, any thing due from him for advances made previous to its date, it would be a mortgage to secure a preëxisting debt, and open to all objections which could be taken to it on that ground under the provisions of the bankrupt act. It would make no difference that the new mortgage was intended as a substitute for so much as had been withdrawn from the first mortgage, or merely to keep up the security, if the jury are satisfied that bricks included in the first mortgage had been sold or disposed of with the express or implied consent of the mortgagees, and the new mortgage was called for by the mortgagees for the purpose of restoring the value of their security; and it would also make no difference that there had been such previous agreement about keeping up the security by giving such new mortgage. If the sales were made with the mortgagees' consent, express or implied, and the new mortgage was given by Josselyn in order to get permission to collect any money due on such sales, it would not have the effect of rendering the new mortgage any the less a security for a preëxisting debt."

Thereupon the defendant asked the judge to give the following additional ruling: "But if the new mortgage was given in consid-

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eration that the mortgagees would release all claim to bricks which had been bargained and delivered, but not paid for, and that Josselyn might receive pay for them, then it would be a substitution of one security for another. If the jury are satisfied upon the evidence that the mortgagees did not intend to release their security under the mortgage of August 21, until they received new security therefor, and the new security was given in consideration of such release, and the new security was intended as a substitution for the old, it would make no difference that the bricks had been removed, sold and delivered, if the same had not been paid for before the making of the new mortgage, although they were removed with their knowledge and without any objection on their part;" which ruling the court refused to give.

The defendant Upham was called as a witness in his own behalf, and was asked the following question: "At the time of taking the mortgage in question, what was your belief as to Josselyn's intention in making the mortgage in question, and also what was your belief as to his solvency?" The plaintiffs objected, and the judge excluded the evidence.

The defendants asked to have the following questions submitted to the jury: "Did Upham intend to release his claim upon bricks sold and unpaid for without getting other security for the same, and did Upham release his claim to bricks sold and unpaid for, and consent that Josselyn should perfect a title to the same in the vendee, and receive pay for the same in consideration of giving this mortgage?" The judge refused to submit these questions, but submitted the following: "Did Josselyn, between August 21 and October 1, sell and deliver bricks with the express or implied permission and consent on the part of Upham?" to which the jury answered "Yes."

The judge also instructed the jury as follows: "If Howe & Upham knew, or had reasonable cause to believe, that Josselyn was insolvent, and if they, with that knowledge, took nearly all his property to secure themselves, and, at the same time, knew that the law required that his property should be divided equally among his creditors, these facts would go far toward supporting the inference that they had reasonable cause to believe that Josselyn intended this mortgage as a preference." To all which rulings and refusals to rule the defendants except.

Verdict for plaintiffs, and defendants appealed.

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G. F. Verry, for defendants (appellants), cited *Harris v. Rickett*, 4 H. & N. 1; *Hutton v. Cruttwell*, 1 El. & Bl. 15; *Stevens v. Blanchard*, 3 Cush. 169; *Jones v. Howland*, 8 Metc. 377, 385; *Ex parte Jordan*, 9 id. 292; *Seaman v. Stoughton*, 3 Barb. Ch. 344; *Nary v. Merrill*, 8 Allen, 451; *Metcalf v. Munson*, 10 id. 491; *Kingman v. Tirrell*, 11 id. 97, § 5; *Commonwealth v. Barry*, 9 id. 276.

P. E. Aldrich, for plaintiffs.

WELLS, J. In order to invalidate a conveyance of property, under the bankrupt law of the United States, section 35, on the ground that it was made as a preference in fraud of the act, it is requisite that it should appear, 1st, that the debtor was insolvent at the time of the conveyance, or that he made it in contemplation of insolvency; 2d, that he did it with a view to give a preference to a creditor; 3d, that the party taking the conveyance, or to be benefited by it, had, at that time, reasonable cause to believe him to be insolvent; and 4th, that such party had reasonable cause to believe the conveyance to be made in fraud of the provisions of the act. The first instruction prayed for embraced all these requisites, and was given by the judge at the trial.

The defendants might have been entitled to the second instruction prayed for, if it had been supported by the facts of the case. *Stevens v. Blanchard*, 3 Cush. 169. But it did not appear that the mortgage of October 1 was given to replace any other security then given up; nor that the property, then for the first time covered by mortgage, was merely substituted for other property which was at the same time released from the mortgage of August 21. The defendants attempted to maintain the position that, although certain property covered by the previous mortgage had been sold and delivered by the mortgagor, yet the defendant Upham had not released it from his mortgage, and that he still had a lien upon it, or upon the unpaid price of sale; and that the new mortgage was given in consideration of a release of his claim, by way of substitution for security thus surrendered. But the jury found upon this question, specially submitted to them, that the sale of that property was made "with the express or implied permission and consent on the part of Upham." If so, his lien under the mortgage of August 21 was gone, and the mortgage of October 1 was a new security, and not a mere

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substitution of securities. It results from this finding of the jury that the defendants were not prejudiced by the refusal of this prayer.

The third instruction prayed for includes the main fact upon which the whole case depended, to wit, the intent to give a preference. By refusing to give that instruction, in the form in which it was presented, the court did not intend, and could not fairly be understood, to rule to the contrary of the proposition it contained. The presiding justice, having already instructed the jury that the plaintiff must show an intent to give preference, on the part of the debtor, might well have regarded a repetition of the proposition in another form unnecessary.

The fourth prayer stands in the same position as the third, so far as it rests upon the element inserted among its propositions, that the transaction was "not with intent to prefer;" and in the same position with the second, so far as it rests upon the proposition that it was merely "a substitution of one security for another released and given up." That this mortgage "was given in the usual and ordinary course of the business of the parties" would not save it, if the intent to prefer existed; and would not exclude the inference of such intent, which might be drawn from all the circumstances under which it was given. That a payment or transfer of the property was made out of the ordinary course of business of the party making it, is sometimes ground for inference of the intent to prefer or to defraud. We would not think that the mortgage of this kiln by the debtor, in this case, gave ground for any inferences, or derived any character from the usual and ordinary course of the business of the parties which the instruction asked for.

The instruction that an agreement for future security "would be a mere executory contract, and not a conveyance," was correct, as well as that the validity of such new mortgage "would depend entirely upon the circumstances under which it was made, and the state of things existing at that time." *Blodgett v. Hildreth*, 11 Cush. 311; *Paine v. White*, 11 Gray, 190; *Simpson v. Carleton*, 1 Allen, 109. So, also, was the instruction that, if the new mortgage covered, or was intended to secure, any thing due for advances made previous to its date, it would be a mortgage to secure a pre-existing debt, and open to all objections which could be taken to it on that ground. The fact that the debtor was induced to give such security for debts previously contracted, by the hope and expectation of thereby obtaining further credit and means for the continued prose-

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ention of his business, does not make it any the less a preference; nor does it rebut the inference, otherwise deducible from the facts, that it was intended to be a preference. *Denny v. Dana*, 2 Cush. 160. If so intended, it would make no difference that it was the purpose of the parties merely to renew or make up the security which had been reduced by previous sales of property included in the earlier mortgage; nor that it was done in fulfillment of previous agreements that it should be done. An agreement to give security for a debt due, or to be contracted, imposes no higher legal obligation upon the debtor than his promise of payment, involved in the contracting of the debt. And his fulfillment of the one is equally open to objection as a preference as is his fulfillment of the other. The instructions were correct in these particulars.

The case of *Jones v. Howland*, 8 Metc. 377, relied on by the defendants, turned upon the question whether the sales which it was sought to avoid were made "in contemplation of bankruptcy," in the sense of the United States bankrupt act of 1841. The terms of that statute were held to require that the intent which would make void a sale must be an intent to give a preference in contemplation of bankruptcy. But the present bankrupt act avoids a sale made with a view to give a preference, if the debtor at the time be in fact insolvent, although he may not contemplate bankruptcy. Under this statute, we think the phrase "with a view to give a preference" must be construed somewhat less strictly, so as to include an intent to give one creditor any advantage over others in respect of payment or security of his debt.

The instructions prayed for, after the charge had been made, present the same questions in a different form. The position of the defendants appears to be, that, if the debtor was influenced to give the mortgage by some other consideration or inducement, beyond and aside from the purpose to secure an existing debt, such circumstance will repel the inference that he intended to give his creditor a preference. But this is directly opposed to the opinion of the court as given in *Denny v. Dana*, before referred to. Besides, the assumption contained in these prayers, that the new mortgage was given in consideration of the release of a claim, under the prior mortgage, upon bricks sold and removed, but not paid for, is shown by the special finding of the jury, to have been without foundation; and thus all ground of exception for their refusal is removed.

The evidence of Josselyn's financial condition and reputation in

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1866 was competent upon the question of his solvency or insolvency a year later, and as tending to show what means the defendants had to know, or cause to believe, that he was insolvent in October, 1867.

If the mortgagee had reasonable cause to believe that Josselyn was insolvent, it is immaterial whether he did in fact believe it or not. The same is true of his belief as to Josselyn's intention in making the mortgage. The question to Upham, as to his actual belief in regard to those particulars, was therefore properly excluded.

It is contended that the instructions set forth in the last clause of the bill of exceptions are obnoxious to the objection of being in the nature of a charge "with respect to matters of fact." But we think it is so in appearance only, and not in substance or effect. The proposition of "reasonable cause to believe" is one of fact, to be established by proof and found by the jury. In order to render a verdict for the plaintiff, it was necessary for the jury to find that the defendants had reasonable cause to believe that Josselyn intended the mortgage as a preference. His intention could be known only by inference from his conduct. It is a principle of law, often stated to a jury by the court, that a man may ordinarily be presumed to intend that which is the natural and probable consequence of his acts. The intent to prefer, on the part of Josselyn, might, therefore, be properly inferred from the fact of preference. It was competent for the jury to find that that intent was so plainly inferable from the acts of Josselyn, known to the defendants, as to amount to reasonable cause to believe. If so, they might properly impute to the defendants such reasonable cause to believe that the mortgage was intended by Josselyn as a preference to them. We do not perceive that any thing more than this was conveyed by the somewhat vague terms in which this instruction is expressed.

Exceptions overruled.

Bradford v. Rice.

BRADFORD V. RICE.

(108 Mass. 472.)

Discharge in bankruptcy—previous judgment.

In an action on a judgment obtained in New Hampshire, after the defendant had been adjudged a bankrupt, on a debt provable in bankruptcy, a certificate of his subsequent discharge in bankruptcy is no bar to the action in Massachusetts, there being no evidence of a different law and practice in New Hampshire.

ACTION on a judgment recovered against the defendant in New Hampshire. The judgment was obtained in October 31, 1867; but previously, September 10, 1867, the defendant had been adjudged a bankrupt, and the debt on which said judgment was recovered then existed and was provable in bankruptcy. January 14, 1868, the defendant obtained his discharge in bankruptcy under United States statute of 1867, chapter 176; and the certificate thereof was presented as a defense to this action. The judge ruled against the defendant and gave judgment for the plaintiff, whereupon the defendant appealed.

L. W. Pierce, for defendant (appellant).

G. H. Whitney, for plaintiff.

GRAY, J. The ruling of the court below was in accordance with a series of decisions of this court, by which it has been held that if, after the institution of proceedings in insolvency or bankruptcy, judgment is recovered upon a debt provable under those proceedings, the original debt is merged and extinguished in the judgment, and the judgment is not provable against the estate of the debtor nor discharged by the certificate; and this not merely because such a merger takes effect by the rules of the common law; but because the creditor, by taking judgment, and so changing the form of his debt, and securing to himself the benefit of conclusive and permanent evidence of it, and an extension of the period of limitation of an action thereon, is held, on his part, to have elected to look to the debtor personally, and to abandon the right to prove against his estate; and the debtor, on the other hand, who might have protected

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himself by moving the court in which the action was pending for a continuance in order to afford him an opportunity to obtain and plead a certificate of discharge, is held, by omitting to make such a motion before judgment, to have waived the right to set up his certificate against the plaintiff's claim; and therefore the rights of both parties must be governed by the judgment which the one was moved for, and the other has suffered, to be rendered. *Sampson v. Clark*, 2 Cush. 173; *Woodbury v. Perkins*, 5 id. 86; *Wolcott v. Hodge*, 15 Gray, 547.

This rule was established when the continuance of the action, in order to enable the debtor to plead his certificate, depended only upon the practice of the court. There is even stronger reason for adhering to it under the present bankrupt act of the United States, which contains an express provision that "no creditor whose debt is provable under this act shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy on the question of the discharge," except in two cases; the one of unreasonable delay on the part of the bankrupt in endeavoring to obtain his certificate; the other, of the plaintiff's proceeding to judgment, by special leave of court, for the single purpose of ascertaining the amount due, which may be proved in bankruptcy, in which last case no execution is to issue on the judgment. U. S. Stat. 1867, ch. 176, § 21. Both of these exceptions accord with the practice of the courts of this State in cases arising under the insolvent law. *Barker v. Haskell*, 9 Cush. 218, 222. And the last of them is analogous to one which has long existed in our statutes concerning the settlement of insolvent estates of deceased persons. Stat. 1784, ch. 2; *Blossom v. Goodwin*, 1 Mass. 502; *Hunt v. Whitney*, 4 id. 620; R. S., ch. 68, § 19, and commissioner's note; Gen. Stat., ch. 99, § 20.

In accordance with the decisions of this court, it has been held by Judge SHIPMAN in the district court of the United States for the district of Connecticut, that a creditor, by taking a judgment in common form after the commencement of bankruptcy proceedings, loses the right to prove in bankruptcy. *In re Williams*, 2 Bar.kr. Reg. 79. And we have been referred to no opposing decision of the federal courts.

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Haggerty v. Amory, 7 Allen, 458, cited for the defendant, was an action upon a judgment recovered in the courts of New York, after the commencement of proceedings in bankruptcy, under the bankrupt act of 1841, which contained no such provision as that of the present bankrupt law, above quoted; and the defendant was allowed to plead his certificate, only because it appeared by the decisions of the New York courts that they did not in practice delay proceedings to allow the defendant to plead it, and therefore consistently held a judgment upon the original debt not to cut off his right to plead it at all.

At the trial of the present case, no evidence was offered that the practice or the decisions in New Hampshire upon this matter differed from our own; and the latest case in the highest court of that State, which was cited at the argument, shows that they are in harmony with ours. *Hollister v. Abbott*, 11 Foster, 442.

Exceptions overruled.

OLIVER, appellant, v. WORCESTER.

(102 Mass. 489.)

Municipal corporation — liability for injuries from negligence of servants.

In an action against a city to recover for personal injuries, it appeared that the plaintiff, while walking across a public common upon a footpath which had been prepared and cared for by the city, and used by the public for more than twenty years, fell into a deep excavation made by the direction of the city in the course of repairing a building used and rented by the city, standing within the common. The excavation was carelessly left unguarded by the servants of the city employed in the work of repairing the building. *Held*, that the city was liable, although the path was not a highway by the law of Massachusetts, on the ground that the city, like a private owner, was liable for injuries caused by the negligence of its servants, to a person coming on grounds under its control, rightfully and by an implied invitation and license.

ACTION in tort for injuries sustained by the plaintiff by falling into a hole in a path near the city hall of Worcester. The trial was begun in the superior court, before ROCKWELL, J., and the jury found for the plaintiff. The defendants alleged exceptions, and a new trial

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was ordered, the attention of the court having been directed mainly to the question whether the path where plaintiff was injured was a highway under general statute, chapter 43, sections 82, 83, deciding that it was not such a highway. At the new trial before DEVENS, J., the following facts were brought out which are all that are material to the case:

"It appeared in evidence, that, in May, 1866, a joint special committee of the city council of Worcester was authorized, by vote of the city council, to cause certain alterations and improvements to be made in the city hall. While these were in progress, in July, 1866, it was voted by the city council 'that the joint special committee on the alteration of the city hall building be authorized to make the necessary and proper arrangements for heating, lighting and furnishing the rooms in the city hall building, and that the expense be charged to the appropriation for contingent expenses.' The committee decided to heat the building by steam, and to locate the boiler under ground, just beyond the southerly side of the hall, in the common, and underneath one of the walks thereon (which the plaintiff offered evidence tending to show had been used by the public for a walk for more than twenty years), and employed a mechanic to do, by the day, the work necessary for placing the boiler. In the performance of this work, the excavation into which the plaintiff fell was dug for the purpose of placing the boiler, and subsequently it was placed there, and the city hall building has since been warmed by the steam furnished by it. The mechanic and his men were paid for this work by the city treasurer by the day. The excavation was about eight feet deep, extended southerly about fifteen feet from the cellar proper of the city hall, and about forty feet from east to west. There was evidence tending to show that the easterly end of this excavation, at the time the plaintiff received her injuries, was carelessly left unguarded, and that, while she was walking on said walk and using due care, she fell into the same and was injured.

"The common has been used, for a time to which the memory of man runneth not to the contrary, by the inhabitants of the town, for purposes of air, recreation, walks, and passing from one section of the town to another; and upon it walks, of which said paved walk was one, have been laid out and graded from time to time, which have always been prepared and cared for by the town and city. The city hall was erected by vote of the town in 1824.

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“In 1852 a space around the city hall, including the place of excavation, was paved with brick by the superintendent of streets of the city, and the expense thereof was paid from the city treasury. Various traveled walks across the common led to this paved walk, from one of which the plaintiff came upon it at the time of the injury. Foot passengers were accustomed to pass and repass over this paved walk, and over the graveled paths aforesaid to and from Main street and other streets.

“Before the city hall was repaired and improved as aforesaid, the city had leased a part of the basement for markets. At the time of the injury, the building, being under repair, was not occupied for any purpose. But ever since the repairs were completed the entire building has been used for city offices, and meetings of the city government, and ward-rooms, excepting that the municipal court and police court for the city have occupied a part of the second story, for which the city receives rent from the county; and the entire basement is used for a lock-up and for police offices for the city police, which said rooms were prepared for these purposes at the time of the repairs aforesaid. All of said repairs and alterations, including the placing the boiler in the excavation, were paid for by the city, and were done under the special superintendence and direction of the committee chosen for that purpose as aforesaid.

“Upon these facts, the judge ruled that the plaintiff could not maintain an action against the city, instructed the jury to return a verdict for the defendants, and reported the case, the verdict to stand, or to be set aside and a new trial ordered, as the supreme judicial court should determine.”

G. F. Verry, for plaintiff (appellant).

W. W. Rice, for defendants.

GRAY, J. The distinction is well established between the responsibilities of towns and cities for acts done in their public capacity, in the discharge of duties imposed upon them by the legislature for the public benefit, and for acts done in what may be called their private character, in the management of property or rights voluntarily held by them for their own immediate profit or advantage as a corporation, although inuring, of course, ultimately to the benefit of the public.

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To render municipal corporations liable to private actions for omission or neglect to perform a corporate duty imposed by general law on all towns and cities alike, and from the performance of which they derive no compensation or benefit in their corporate capacity, an express statute is doubtless necessary. Such is the well-settled rule in actions against towns or cities for defects in highways. 5 Edw. IV; 2, pl. 24; *Riddle v. Proprietors of Locks and Canals*, 7 Mass. 169, 187; *Mower v. Leicester*, 9 id. 247; *Holman v. Townsend*, 13 Metc. 297; *Brady v. Lowell*, 3 Cush. 121; *Providence v. Clapp*, 17 How. 161, 167. The same rule has been held to govern an action against a town by a legal voter therein, for an injury suffered while attending a town meeting, from the want of repair in the town-house erected and maintained by the town for municipal purposes only; or by a child, attending a public school, for an injury suffered from falling into a dangerous excavation in the school-house yard, the existence of which was known to the town, and which had been dug by order of the selectmen to obtain gravel for the repair of the highways of the town, and to make a regular slope from the nearest highway to the school-house. *Eastman v. Meredith*, 36 N. H. 284; *Bigelow v. Randolph*, 14 Gray 541.

But this rule does not exempt towns and cities from the liability to which other corporations are subject, for negligence in managing or dealing with property or rights held by them for their own advantage or emolument. Thus, where a special character, accepted by a city or town, or granted at its request, requires it to construct public works, and enables it to assess the expense thereof upon those immediately benefited thereby, or to derive benefit in its own corporate capacity from the use thereof, by way of tolls or otherwise, the city or town is liable, as any other corporation would be, for any injury done to any person in the negligent exercise of the powers so conferred. *Henley v. Lyme*, 5 Bing. 91; S. C., 3 B. & Ad. 77; 1 Scott, 29; 1 Bing. (N. C.) 222; 2 Cl. & Fin. 331; 8 Bligh (N. S.) 690; *Weet v. Brockport*, 16 N. Y. 161, note; *Weightman v. Washington*, 1 Black, 39; *Nebraska City v. Campbell*, 2 id. 590; PERLEY, C. J., in *Eastman v. Meredith*, 36 N. H. 289, 294; METCALF, J., in *Bigelow v. Randolph*, 14 Gray, 543; *Child v. Boston*, 4 Allen, 41, 51.

So where a municipal corporation holds or deals with property as its own, not for the direct and immediate use of the public, but for its own benefit, by receiving rents or otherwise, in the same way as

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a private owner might, it is liable to the same extent as he would be, for the negligent management thereof to the injury of others. In *Thayer v. Boston*, 19 Pick. 511, it was held that a city was liable for the acts of its agents, previously authorized or afterward ratified by the city, in obstructing a highway to the special and peculiar injury of an individual, by erecting buildings under a claim of title in the fee of the land, for which the city received rent. In *Anthony v. Adams*, 1 Metc. 284, cited for the defendant, the town was held not liable, solely because the act which occasioned the injury was one which the town had not authorized, and was not required by law to do. In *Bailey v. New York*, 3 Hill, 531, Chief Justice NELSON clearly stated the distinction between acts done by a city or town as a municipal or public body, exclusively for public purposes, and those done for its own private advantage or emolument; and assumed, as unquestionable, that "municipal corporations, in their private character as owners and occupiers of lands and houses, are regarded in the same light as individual owners and occupiers and dealt with accordingly." In *Pittsburgh v. Grier*, 22 Penn. St. 54, a city was held liable to a private action for an injury suffered by an individual by reason of a defect in a wharf, of which the city had the exclusive control, and for the use of which it received wharfage. In *Eastman v. Meredith*, 36 N. H. 295, 296, Chief Justice PERLEY said: "Towns and other municipal corporations, including counties in this State, have power, for certain purposes, to hold and manage property, real and personal; and for private injuries, caused by the improper management of their property, as such, they have been held to the general liability of private corporations and natural persons that own and manage the same kind of property." "So far as they are the owners and managers of property, there would seem to be no sound reason for exempting them from the general maxim which requires an individual so to use his own that he shall not injure that which belongs to another." And in *Mersey Docks Trustees v. Gibbs*, 11 H. L. C. 687; S. C., Law Rep., 1 H. L. 93; the house of lords, upon an elaborate revision of the English cases, held that the trustees of the docks at Liverpool, incorporated by act of parliament for the purpose of making and maintaining docks and warehouses for the use of the public, with authority to receive rates for such use, which were to be applied exclusively to the maintenance of the docks and warehouses and the payment of the debt incurred in their construction, were liable to an action by an

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individual for an injury to his vessel in entering one of the docks, by striking upon a bank of mud which their servants and agents had negligently suffered to accumulate at and about the entrance.

In the case at bar it appears from the report of the learned judge, who presided at the second trial, that the evidence tended to show that the plaintiff, while walking, using due care, upon a footpath which had been used by the public for more than twenty years, and had been laid out and graded from time to time and prepared and cared for by the town and city of Worcester, and was within the public common which had been used by the inhabitants of the town for a much longer period, fell into a deep excavation, made by direction of a joint committee of the city council, under the authority and at the expense of the city, in the course of repairing and improving a building standing within the common, used by the city principally for municipal purposes, but a substantial portion of which, both before and after the time of the accident, the city leased, and received rent for, either from private persons or from the county, and which was therefore held and used by the city, not for municipal purposes exclusively, but in considerable part as a source of revenue; and that this excavation was within a few feet of the building, and was carelessly left unguarded. If, in the course of repairing this building, the servants and agents of the city, acting by its authority, negligently suffered the adjoining land within its control to be in a dangerous condition, without proper notice to persons exposed to the danger, coming there rightfully under an implied invitation and license, and using due care, the city was responsible, as any private owner would be, for an injury sustained by such a person by reason of such negligence; and it is immaterial whether the title in the land was or was not in the defendant. *Carleton v. Franconia Iron & Steel Co.*, 99 Mass. 216. The case should therefore have been submitted to the jury.

New trial ordered.

Spooner v. Holmes.

SPOONER, appellant, v. HOLMES.

(108 Mass. 502.)

Conversion of stolen property — liability of agent.

Certain coupons of United States bonds, belonging to S., had been stolen from him, and delivered by one who received them from the thief to H., and by him, acting as agent and in good faith without gross negligence, sold and turned into money which he paid to the person from whom he received them. *Held*, that H. was not liable to S. for their conversion.

ACTION in tort to recover the value of certain coupons of United States bonds bearing interest and payable to bearer in gold. The coupons were alleged to have been converted to the defendant's use.

The facts in the case appear in the opinion.

P. Simmons, for plaintiff (appellant).

L. W. Howes, for defendant.

GRAY, J. This is an action of tort, in the nature of trover, for certain coupons of United States bonds, alleged in the declaration to be the property of the plaintiff and to have been converted by the defendant to his own use. The undisputed evidence at the trial showed that the bonds had belonged to the plaintiff, and had been stolen from him, and delivered by one who received them from the thief to the defendant, and by him sold and turned into money, which he is admitted to have paid over to his principal. But the jury have found that in so doing the defendant acted only as agent of the person from whom he received them, and did not know, and was not guilty of gross negligence in not knowing, that that person had come dishonestly by them. It does not appear that the plaintiff ever demanded of the defendant either the coupons or their proceeds, or that the defendant personally derived any benefit from his acts. The principal question in the case is, whether, under these circumstances, he is liable in this action. This is an important question, and has received great consideration from the court.

An action of tort for the conversion of personal property, under our present system of pleading, requires such evidence to support it

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as would have proved a conversion in an action of trover at common law; and cannot be maintained without proof that the defendant either did some positive wrongful act with the intention to appropriate the property to himself or to deprive the rightful owner of it, or destroyed the property. *Fouldes v. Willoughby*, 8 M. & W. 540; *Heald v. Carey*, 11 C. B. 977; Gen. Sts., ch. 129, § 81; *Robinson v. Austin*, 2 Gray, 564; *Loring v. Mulcahy*, 3 Allen, 575; *Parker v. Lombard*, 100 Mass. 405. In the last case, Mr. Justice HOAR says, that if a bailee, being intrusted with the possession merely, transfers the possession according to the directions of the person from whom he received it, without notice of any better title, and without undertaking to convey any title, this does not appear to have been held any evidence of a conversion; and cites *Strickland v. Barrett*, 20 Pick. 415, and *Leonard v. Tidd*, 3 Metc. 6. So where chattels were delivered by the owner to a bailee, with the right to purchase them by paying a certain price, so that he had the actual legal and rightful possession, although he had not performed the condition on which he was to have the absolute title, and he sold them to a third person, who resold them before any demand made upon him and without notice of the agreement between his vendor and the original owner, he was held not to be liable to the latter in trover. *Vincent v. Cornell*, 13 Pick. 294; see, also, *Day v. Bassett*, ante, 445. And trover will not lie against a servant for taking goods by his master's command and for his master's use, when the command is not to do an apparent wrong, and the servant's possession is lawful. Bul. N. P. 47; *Powell v. Hoyland*, 6 Exch. 67.

In the case of a sale of goods, indeed, the purchaser is bound to look to his title, and, if he obtains them from one who is not the lawful owner or his authorized agent, cannot hold them against him. 2 Kent's Com. (6th ed.) 324. If the goods have been stolen, the property does not pass by delivery, and a person who derives his title from the thief gains no rights as against the lawful owner, and if he either refuses upon demand to deliver them up, or sells them and turns them into money, or otherwise converts them to his own use, he is liable to the lawful owner in trover. *Dame v. Baldwin*, 8 Mass. 518; *Heckel v. Lurvey*, 101 id. 344. Upon this principle, it is held that an auctioneer, who receives and sells stolen goods, not knowing nor having reason to believe that they were stolen, or a person who in good faith buys a stolen horse, and afterward exercises dominion over him by letting him to a third person, is liable

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to the rightful owner in trover, without a previous demand. *Hoffman v. Carow*, 22 Wend. 285; *Coles v. Clark*, 3 Cush. 399; *Gilmore v. Newton*, 9 Allen, 171. Yet even in the case of stolen goods, a mere naked bailee, who does not act, and has no intent, to convert them into his own use, or withhold them from the owner, and, before any demand made upon him, delivers them back to the person from whom he received them, is not guilty of a conversion, although he knew that they were stolen. *Loring v. Mulcahy*, 3 Allen, 575.

But in the opinion of a majority of the court, the coupons in question do not stand upon the same ground as chattels. They were negotiable promises for the payment of money, issued by the government, payable to bearer and transferable by mere delivery, without assignment or indorsement. They are, therefore, not to be considered as goods, but as representatives of money, and subject to the same rules as bank bills or other negotiable instruments payable in money to bearer. *Wookey v. Pole*, 4 B. & Ald. 1; *Grogier v. Mienville*, 4 D. & R. 641; S. C., 3 B. & C. 45; *Commonwealth v. Emigrant Industrial Savings Bank*, 98 Mass. 12. The rule of *caveat emptor* does not apply to them. It is now well settled that the bearer of a bank bill which has been stolen from the bank may recover the amount from the bank unless it is proved that he did not take it in good faith and for valuable consideration, and that his knowledge of suspicious circumstances is immaterial, unless amounting to proof of want of good faith. *Worcester Co. Bank v. Dorchester and Milton Bank*, 10 Cush. 488; *Wyer v. Dorchester and Milton Bank*, 11 id. 51; *Raphael v. Bank of England*, 17 C. B. 161. And, according to the great weight of authority, the same rule applies to bills of exchange or promissory notes payable to bearer. *Goodman v. Simonds*, 20 How. 343.

The jury have found that the defendant took these coupons in good faith, without gross negligence, and as agent of his employer. He thus acquired a lawful possession of them, which was no evidence of a conversion. He then, before any demand or notice from the rightful owner, transferred them by delivery, and exchanged them for money, the amount of which he paid over to his employer. This case does not present the question whether the defendant could have been held liable to the rightful owner for the coupons or the proceeds while in his own hands, nor whether he could be held to have paid value for them. The single question is, whether he has

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been guilty of a wrongful conversion, and, considering the nature of the instruments, and the fact that the defendant was acting in good faith, without gross negligence, as agent only, without himself receiving any benefit from the transaction, a majority of the court is of opinion that neither taking the coupons by delivery, transferring them by delivery, nor paying over the proceeds to his employer, constituted a conversion for which he can be held liable in an action of tort in the nature of trover. Addison on Torts (3d ed.), 317. The instructions to the jury were therefore quite favorable enough to the plaintiff.

The letter admitted against the objection of the plaintiff was competent evidence of the manner in which, and the circumstances under which, the defendant received the coupons, although it did not of itself prove that it was written by his employer.

Exceptions overruled.

TRAFTON V. HAWES.

(103 Mass. 583.)

Deed of freehold to take effect in future.

A deed of land, reciting a pecuniary consideration and to take effect after the decease of the grantor, upon condition of certain services to be rendered him, may be maintained as a covenant to stand seized to the grantee's use, notwithstanding the absence of the relation of blood or marriage between the grantor and grantee.

ACTION in ejectment. The demandant of the premises claimed title by virtue of a deed dated August 10, 1861. By this deed Samuel Hawes, "in consideration of \$650," conveyed to the demandant, her heirs and assigns, the premises in question *habendum* to her and her heirs and assigns forever, "after my decease, upon condition that she continues to keep my house and take care of me during my natural life, or her own natural life, if she dies first." The deed contained the usual covenants of a deed of warranty, in the common form. There was no relation of blood or marriage between the par

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ties to the deed. The grantor died January 14, 1864; and this suit was commenced April 27, 1868, against one of the heirs, who was the tenant of the premises, claiming title to one undivided fourth. At the trial the tenant insisted that the deed was invalid as conveying a freehold to commence *in futuro*, and that it could not be sustained as a covenant to stand seized to demandant's use for want of a consideration of blood or marriage; but the judge did not so rule. The demandant proceeded to show that the \$650 recited in the deed was an actual debt which she released to the grantor at the time the deed was executed and delivered; and that the premises were not worth, at the date of the deed, more than that sum. The tenant proceeded to show that the services to be performed in the future were the only consideration for the deed. The demandant was allowed, under objection, to testify as a witness generally in his own behalf. Verdict for the demandant, and the tenant appealed.

W. Colburn, for tenant (appellant).

E. Ames, for demandant.

WELLS, J. The demandant is grantee in a deed of warranty in the common form, which recites a pecuniary consideration paid, *habendum* to the grantee, her heirs and assigns forever, after the decease of the grantor, upon condition of certain services to be rendered to him. There was no relation of blood or marriage between the grantor and grantee. The grantor has since died, and the suit is against one of his heirs. The tenant insists that the deed is invalid as conveying a freehold to commence *in futuro*, and that it cannot be sustained as a covenant to stand seized, for want of a consideration of blood or marriage.

This position of the tenant we understand to be in accordance with the law of England. It has always been held that a feoffment, or other conveyance deriving its operation from the common law, cannot be made to take effect in future. The same rule is applied in England to a "bargain and sale," which derives its operation from the statute of uses. Stat. 27 Hen. VIII, ch. 10. Although the owner of a remainder, or future interest in lands, may convey his interest by bargain and sale; yet the sale of a future interest, by one having the present legal estate, requires either that he should in the mean time hold that legal estate to support the future use;

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which is, by construction, a covenant to stand seized; or else that the bargainee should hold the estate for the use of the bargainor until the time arrive for his own interest to take effect; which would be a use limited upon a use, and not sustainable under the rule in respect to the limitation of uses. A bargain and sale is construed to imply the present transfer of the bargainor's interest, and not the limitation of a future interest out of his estate.

It has also been uniformly held in England, ever since the statute of uses was passed, or rather since the statute of enrollments (Stat. 27. Hen. VIII, ch. 16), that a covenant to stand seized can be sustained only by a consideration of blood or marriage.

In this country there is much confusion and uncertainty in the law upon this subject, whether sought in the announcements of judicial opinion or in the discussions of text-writers. The doctrine that a bargain and sale, as well as a common-law conveyance, is invalid to create a future interest in lands of the grantor, has been recognized and repeatedly declared to be the law in Massachusetts. *Wallis v. Wallis*, 4 Mass. 135; *Pray v. Pierce*, 7 id. 381; *Welsh v. Foster*, 12 id. 93; *Parker v. Nichols*, 7 Pick. 111; *Gale v. Coburn*, 18 id. 397; *Brewer v. Hardy*, 22 id. 376; also, in Maine, *Emery v. Chase*, 5 Greenlf. 232; *Marden v. Chase*, 32 Me. 329. In several of the cases above cited, as well as in *Miller v. Goodwin*, 8 Gray, 542, the court may be said to have impliedly recognized the doctrine that a covenant to stand seized requires a consideration of blood or marriage, by looking to the existence of such a fact in the case for the support of the deed, notwithstanding the recital of a pecuniary consideration in the deed itself. But we are not aware that the court has ever declared such a consideration to be necessary. In *Parker v. Nichols*, 7 Pick. 111, Mr. Justice PUTNAM, after pointing out the existence of the relation, remarks: "So that, if it were necessary in this State, as it seems to be in England, to prove a consideration of blood or marriage to support a covenant to stand seized to uses, it might be presumed." This sentence is also quoted by Chief Justice SHAW in the case of *Gale v. Coburn*, 18 Pick. 397, 402.

In New York, the doctrine that a deed of bargain and sale cannot be made to take effect *in futuro*, is regarded by Mr. Justice LEWIS, in *Jackson v. Dunsbagh*, 1 Johns. Cas. 91, as resulting only from the English statute of enrollments, and therefore not to prevail in that State. This opinion is approved in *Jackson v. Swart*, 20 Johns. 85, though in neither case was it essential to the judgment. It is dis-

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tinctly announced, however, in *Jackson v. McKenny*, 3 Wend. 233, and in *Rogers v. Eagle Fire Co.*, 9 id. 611. It is held, however, in New York, that a consideration of blood or marriage is absolutely essential to the validity of a covenant to stand seised. *Jackson v. Sebring*, 16 Johns. 515; *Jackson v. Cadwell*, 1 Cow. 623; *Jackson v. Delancey*, 4 id. 427.

The courts in New Hampshire follow the New York decisions. *French v. French*, 3 N. H. 234; *Underwood v. Campbell*, 14 id. 393; *Bell v. Scammon*, 15 id. 381.

The doctrine is said to be founded upon the peculiar domestic character of this species of conveyance. 4 Kent's Com. (6th ed.) 493. In *Jackson v. Sebring*, 16 Johns. 515, the learned chancellor gives this remarkable account of it: "A covenant to stand seised is a peculiar species of conveyance, confined entirely to family connections, and founded on the tender considerations of blood or marriage. No use can be raised for any purpose, in favor of a person not within the influence of that consideration. There is no cold, selfish, calculating motive to contaminate the contract, nor is the conveyance to be profaned by the footstep of a stranger." Nevertheless, it is said (4 Kent's Com. [6th ed.] 493), that "the existence of another consideration, in addition to that of blood or marriage, will not impede the operation of the deed." The law does indeed recognize the natural affections, and the mutual obligation of support which springs from the family relations, as affording a good and meritorious consideration, sufficient for a deed of conveyance. But that a form of conveyance should be so consecrated by a mere sentiment that it cannot be permitted to operate between any parties other than relatives, nor upon a pecuniary consideration, would be an anomaly, of which the law should not be suspected upon slight grounds. Upon every principle of the law of contracts, money is a sufficient consideration for the support of any contract whatever, so far as its validity depends upon a consideration, as such.

It is important, therefore, to examine the source of the distinction between covenants to stand seised and other contracts and conveyances, in relation to the consideration upon which they are supported. That such a distinction does exist in the English law is without question; and its assertion appears in the text of Mr. Greenleaf's edition of Cruise on Real Property, title 32, chapter 2, section 41, and chapter 10, section 12, without explanation, other

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than a reference to the case of *Welsh v. Foster*, 12 Mass. 93. Section 23 of the latter chapter, which is section 25 of the corresponding chapter of Cruise's Digest, is as follows: "Where a deed is made in consideration of a sum of money, it will not operate as a covenant to stand seised." In a note, Mr. Greenleaf states that "the contrary is law in the United States; the reasons for the English rule not existing here."

In 2 Washb. on Real Prop. (1st ed.) 605, it is said: "The difference, theoretically, between a bargain and sale and a covenant to stand seised, consisted in the consideration out of which the use was raised to which the law united the seisin;" although "this distinction seems to have been sometimes lost sight of by the courts." See, also, id. 613, pl. 9. The author suggests that the decisions in this country, giving effect to conveyances of land *in futuro* by deed of bargain and sale, amount only, in reality, to holding that estates may be created by covenant to stand seised upon a valuable consideration. See id. 124, pl. 25; 616, pl. 14-16.

In *Welsh v. Foster*, 12 Mass. 93, Mr. Justice JACKSON uses this language: "The principle, then, seems to be, that a man may convey his land by a covenant to stand seised thereof to the use of another, either for certain good considerations, or for a valuable consideration; but in the latter case the conveyance, being in effect a bargain and sale, must have all the other requisites and qualities of a bargain and sale. One of these qualities is, that it must be to the use of the bargainee and that another use cannot be limited on that use; from which it follows, that a freehold to commence *in futuro* cannot be conveyed in this mode; as that would be to make the bargainee hold to the use of another, until the future freehold should vest." He proceeds to say that the English statute of enrollments (27 Hen. VIII, ch. 16) has never been adopted here; but does not say how far or in what manner the English rule of law is modified by the absence of that statute provision; and the case under consideration was disposed of upon another independent ground.

We are satisfied, however, that the distinction between a deed of bargain and sale and a covenant to stand seised, so far as it requires for the validity of the latter a consideration of blood or marriage, is artificial and constructive, depending entirely upon the statute of enrollments, and having no pretext for continued existence where the provisions of that statute do not apply.

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Prior to the statute of uses, deeds of bargain and sale and of covenant to stand seised did not operate to convey the title, but only the right to the beneficial use. As affecting the land itself, they were regarded as executory or unexecuted contracts. At law, they were of no force as conveyances. In equity they were enforced by requiring him in whom was the legal title to hold that title for the benefit of him to whom the right of use had thus been transferred. A bargain and sale implies the sale and transfer of an interest existing at the time in the bargainor, whether in possession, or in remainder or expectancy. A covenant to stand seised implies the creation of a new interest in the bargainee out of the estate of the bargainor. In either case, the bargainor, having the legal title, was held to stand seised to the use of the bargainee: in the covenant to stand seised, because such was the nature of his contract, either in express terms or by the judicial interpretation; in the bargain and sale, because the court imposed it upon him as an obligation resulting from his sale of the use, and necessary to give it effect. That construction was generally adopted which was best calculated to give effect to the instrument. Whether a deed belonged to the one class or the other was determined by the nature of the subject-matter and the apparent intent of the parties, rather than by the form of the instrument. Courts of equity, however, refused to be moved to interfere actively in favor of a mere volunteer. It became necessary, therefore, in all cases, to show that the deed was founded upon a good consideration. A "bargain and sale" necessarily involves the idea of a valuable consideration. A covenant to stand seised does not exclude it. But the courts held that a consideration of blood or marriage was also sufficiently meritorious to sustain a deed of the latter class.

The statute of uses (27 Hen. VIII, ch. 10) provided that the legal title should follow the beneficial interest, and vest in the *cestui que use* "after such quality, manner, form and condition as they had before in or to the use, confidence or trust that was in them." Under this statute it would seem that the rules affecting the consideration and the construction of instruments would remain unchanged. The law simply carried the legal title where equity placed the equitable right.

The statute of enrollments, passed during the same year (27 Hen. VIII, ch. 16), provided that no lands "shall pass from one to another, whereby any estate of inheritance or freehold shall be made or take

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effect, or any use thereof to be made, by reason only of any bargain and sale, except by writing indented, sealed and enrolled." In applying this statute, as it did not include covenants to stand seised, the courts found it necessary to construe all deeds upon valuable considerations to be deeds of bargain and sale. Otherwise the purpose of the statute would have been entirely defeated; because a deed of bargain and sale, in form, might be construed as a covenant to stand seised, as it was in effect, and had always been construed whenever the nature of the case required; and a deed, in form of a covenant to stand seised, would operate to carry into effect that which was in fact a bargain and sale. The consequence was, that all deeds founded upon a valuable consideration were required to be enrolled in order to be held valid; and as they could be enrolled only as deeds of bargain and sale, it was held that they must take all the characteristics of a bargain and sale, according to the construction which had always been put upon that form of transfer. Covenants to stand seised upon consideration of blood or marriage continued to be good without enrollment, and were effectual to convey the legal title under the statute of uses. But they could not be aided by a valuable consideration, because, under the construction of the statute of enrollments, that had no effect except to show a bargain and sale, void if not enrolled, and operating if enrolled only as a bargain and sale. Hence it became, and has ever since remained, the settled law of England, that covenant to stand seised upon a valuable consideration, without the relation of blood or marriage, is of no effect to pass title to lands.

Another peculiarity of English law may have some bearing upon the question we are considering, namely, that a voluntary conveyance, where there is no such relation of blood or marriage, is void, not only against creditors but also against subsequent purchasers for value, even with notice of the prior deed.

The English statute of enrollments has no application to this country. In Massachusetts, all deeds of land are required to be recorded alike. A deed of itself imports a consideration. The recital of a consideration is conclusive for the purpose of supporting the deed against the grantor and his heirs. A voluntary conveyance or gift to a stranger is good against the grantor and his heirs. It is also good against a subsequent purchaser for value, in the absence of actual fraud. *Beal v. Warren*, 2 Gray, 447. The reason for distinguishing between a deed of bargain and sale and a covenant to stand seised, on the ground of the nature of the consid

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eration, does not exist here. Between the grantor and his heirs and the grantee, in a controversy respecting the title, there is no question open in relation to the nature or existence of the consideration; unless it be in connection with a charge of fraud in procuring the execution of the deed. It is the duty of the court to seek by construction to maintain rather than to defeat the operation of the deed. In case of a deed to take effect at the decease of the grantor, there being nothing to the contrary in the statutes or in the rules of law applicable to this commonwealth, it is the duty of the court, in accordance with the foregoing principles of construction, to give to the deed its intended operation, by construing it as a covenant to stand seized to the use of the grantee, according to the nature of the use granted. The deed in the present case may, therefore, be properly maintained as a covenant to stand seized, notwithstanding the absence of the relation of blood or marriage between the grantor and grantee.

But the demandant was not a competent witness to prove performance of the condition upon which the deed was given. The deed was the contract in issue and on trial. It constituted the title on which the demandant rested her claim to the premises. The plea puts that title distinctly in issue. The grantor, "one of the original parties to the contract," is dead, and the demandant is "the other party." The statute excludes her. Gen. Stats., ch. 131, § 14; *Straw v. Greene*, 14 Allen, 206; *Morony v. O'Laughlin*, ante, 184. On this ground a new trial must be granted.

Exceptions sustained.

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SCHOOL DISTRICT IN MEDFIELD v. BOSTON, HARTFORD & ERIE
R. R. Co., appellants.

(108 Mass. 552.)

Common carrier — special contract.

A declaration in an action on contract alleged that the defendants, as common carriers, received the plaintiffs' goods for transportation and that the goods were injured while in defendants' custody through the fault of the defendants. The answer, after admitting the receipt of the goods for transportation by the defendants as common carriers, denied that the goods were injured while in their custody, or while they were responsible, or by their fault, and alleged that the defendants had taken reasonable care of the goods while in their custody and that they were not responsible for the injury, if any, because by special contract the risk of injury had been assumed by the plaintiffs. *Held*, that upon the pleadings actual negligence of the defendants might be given in evidence; and that the special contract, if alleged, would not exempt the defendants from liability for injuries caused by their own negligence.

ACTION on contract. The facts appear in the declaration, answer and bill of exception.

Declaration. "And the plaintiffs say that the defendants are common carriers of merchandise over their railroad from Boston to Medfield; that, by order of the plaintiffs, Gardner Chilson delivered to the defendants, as such common carriers, a certain cast-iron cone (so-called) for a furnace, the property of the plaintiffs, which the defendants received, as such common carriers, and agreed to deliver to the plaintiffs, at the depot of the defendants in Medfield, for a reasonable compensation; that said cone was, when received by the defendants, whole, sound and in good condition; that, while said cone was in the care and custody of the defendants, and before it was delivered to the plaintiffs, as aforesaid, and while the defendants were responsible therefor, said cone was broken and destroyed, through the fault of the defendants and their servants."

Answer. "The defendants admit that they received for transportation two furnace cones, as alleged, and that said cones were cracked or fractured; but they say that said crack or fracture in said cones existed prior to their receipt by the said corporation; and they deny that said cones were whole or in good condition when so received,

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or that while said cones were in their care or custody, or while the defendants were responsible therefor, said cones were broken, destroyed or injured; and they deny that said cones were in any way injured or destroyed by said defendants or their agents, either with or without fault on their part. And the defendants further say, that they used all reasonable and proper care and diligence in the charge, management and handling of the said cones while in their possession and under their control; and that, even if they were broken or injured while so in their possession, still the defendants, while in the exercise of such reasonable care and diligence, were not liable for such injury, if any, because, by notice brought home to the plaintiffs, and to Gardner Chilson, from whom the defendants received the same, and which was assented to by them, and through the special contract created thereby, as well as by the low rate of freight paid for the carriage of said cones, the same were taken as castings at the owners' risk of fracture or injury during the course of transportation, loading and unloading. And the defendants deny that they owe the plaintiffs the sum claimed in their writ and declaration, or any other sum or sums whatsoever."

Bill of Exceptions. "This was an action against the defendants as common carriers. The declaration and answer may be referred to as a part of the bill of exceptions. In his address to the jury, the counsel for the plaintiffs commenced to argue on the question of actual negligence on the part of the defendants; to which their counsel objected, on the ground that the declaration counted only on the liability as insurers, and not on negligence, and requested the judge to sustain his objection. The judge declined so to do; and afterward charged the jury on the point of negligence, stating that for this the road would be liable, even if the jury found the special contract to have been made, and directed them to find specially on this issue of actual negligence. The jury, through their foreman, stated that they found the defendants were guilty of negligence. To this ruling and charge of the court the defendants excepted."

H. F. Smith, for defendants (appellants).

W. Colburn, for plaintiffs.

GRAY, J. The declaration is in contract against the defendants as common carriers. It alleges that the defendants, as common

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carriers, received the plaintiffs' castings, and agreed to deliver them to the plaintiffs at the place of destination, for a reasonable compensation; and that the castings, while in the care and custody of the defendants, and while they were responsible therefor, were broken and destroyed through the fault of the defendants and their servants. It thus in substance and effect alleges that the defendants as common carriers received the plaintiffs' property and agreed to transport it for hire to its destination, and that it was injured and destroyed through their negligence. The form of the declaration is not to be commended; but it was not demurred to in the court below, and cannot therefore be objected to in this court. The answer admits that the defendants received the castings for transportation as alleged in the declaration, that is to say, as common carriers; and denies that the castings were broken or destroyed while in their care and custody, or while they were responsible therefor, either by the fault of themselves or their agents, or otherwise. The defendants at the trial objected to the case being argued to the jury on the issue of actual negligence on their part, upon the very ground that the declaration counted only on their liability as insurers, which is as much as to say, as common carriers. And their bill of exceptions states that it was an action against them as common carriers. It is not, therefore, open to them now to deny that the declaration sufficiently charges them as common carriers for the injury of the plaintiffs' goods. *Alden v. Pearson*, 3 Gray, 342; *Batchelder v. Batchelder*, 2 Allen, 105.

A common carrier is liable, in contract as well as in tort, for goods received to be carried by him, and injured either by the negligence of himself or his servants, or by any other cause, except the act of God or public enemies. In a declaration in contract against a common carrier, it is common, though not necessary, to allege that the goods were injured by the negligence of himself and his servants. *Dale v. Hall*, 1 Wils. 281; *Richards v. London, Brighton & South-coast Railway Co.*, 7 C. B. 839; 2 Chit. Pl. (6th Am. ed.) 117. And under such a declaration actual negligence may be given in evidence. In *Forward v. Pittard*, 1 T. R. 33, Lord MANSFIELD summed up the law on this subject: "It appears from all the cases for a hundred years back, that there are events for which the carrier is liable independent of his contract. By the nature of his contract he is liable for all due care and diligence; and for any negligence he is liable on his contract. But there is a further degree of responsi-

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bility by the custom of the realm, that is, by the common law; a carrier is in the nature of an insurer." And in *Trent & Mersey Navigation Co. v. Wood*, 4 Doug. 291, Mr. Justice BULLER said: "Negligence in point of fact should in general be proved, but negligence in point of law is sufficient if the facts proved show what the law calls negligence." See also *Smith v. Horne*, 8 Taunt. 144; S. C., 2 Moore, 18. By the allegations in the declaration and the denials in the answer, negligence was put in issue; and if proof of actual negligence was not necessary to support the action, its admission affords the defendants no ground of exception.

The answer further alleges that the defendants used all reasonable and proper care and diligence in the charge, management and handling of the castings while in their possession and under their control; and that, even if they were broken or injured while so in their possession, still the defendants, while in the exercise of such reasonable care and diligence, were not liable for such injury, if any, because, by special contract between the parties, the same was taken at the owners' risk of fracture or injury during the course of transportation, loading or unloading. But the special contract here set up is not alleged, and could not by law be permitted, to exempt the defendants from liability for injuries by their own negligence. *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 383; *Squire v. New York Central Railroad Co.*, 98 Mass. 239, and cases there cited; *Pennsylvania Railroad Co. v. Butler*, 57 Penn. St. 335; *Welsh v. Pittsburgh, Fort Wayne & Chicago Railroad Co.*, 10 Ohio St. 65. In *Wyld v. Pickford*, 8 M. & W. 458, Baron PARKE, speaking of a special contract, said: "Probably the effect of such a contract would be only to exclude certain losses, leaving the carrier liable as upon the custom of England for the remainder." See also *Clark v. Barnwell*, 12 How. 272, 280. It might, perhaps, be necessary, under the English practice, when a special contract is pleaded, that the plaintiff should file a replication alleging negligence. See *Butt v. Great Western Railway Co.*, 11 C. B. 140. But under our practice act, no replication having been ordered by the court, the plaintiffs might, without further pleading, disprove the defendants' allegation that they exercised reasonable and proper care and diligence. Gen. Stats., ch. 129, § 23. If that allegation was disproved, the defense founded on the special contract was not sustained. Evidence of actual negligence was therefore competent and material on this issue.

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The defendant must be confined to the objections made at the trial and stated in the bill of exceptions. No question was raised of the burden of proof; nor of variance between the contract alleged in the declaration and that set up in the answer. The only exceptions taken were to the refusal of the judge to sustain the objection that actual negligence was no ground for charging the defendants under a declaration counting on their liability as insurers; and to the instruction that, even if the jury found the special contract to have been made, the defendants would be still liable for negligence.

In the opinion of the majority of the court, and for the reasons already stated, both of these rulings were correct, and there is, therefore, no ground upon which the defendants' exceptions can be sustained.

Exceptions overruled.

COOMBS V. NEW BEDFORD CORDAGE COMPANY.

(103 Mass. 572.)

Liability of master for injuries received by servant.

The plaintiff was a boy fourteen years old, employed in defendants' factory to tend machinery, and on the second day of his employment, while standing in his proper place, tending a drawing-machine, his left hand was caught in the cogs of a machine, standing in dangerous proximity, and badly injured. *Held*, that instructions to the jury embodying the following principles were correct: That, if plaintiff was of sufficient age and intelligence to understand the nature of the risk to which he was exposed, and had reasonable notice of the dangerous nature of the service which he was performing, the defendants were not liable; but that, if the defendants knew or had reason to know the peril to which plaintiff was exposed, and failed to give sufficient or reasonable notice of it, and if plaintiff, without negligence, from inexperience, or reliance upon the directions given him, failed to perceive or appreciate the danger, and was injured in consequence, the defendants were liable.

ACTION in tort to recover for personal injuries sustained by plaintiff while in defendants' employment. The case was tried in April, 1868, before FOSTER, J., and reported for the decision of the whole court. The facts are substantially as follows: In August, 1866, the

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plaintiff, then being under fourteen years of age by three or four months, with the knowledge and consent of his father, applied to the defendants for employment in their cordage factory and was received into their employment. He had never been so employed before and had always been at school. On the first day, Monday, August 12, he was set at work to fill cans with the roping or strands of manilla as it came from a drawing machine, with another boy who was directed to instruct him. On the next day, plaintiff was set at work at another machine where the work was not materially different, but the strands were hemp instead of manilla. The overseer directed a boy to show him about this work. At the left hand, removed a foot or two from this machine, stood another machine in operation, upon the side of which (and toward plaintiff's machine) was a combination of eleven gears of various sizes working upon each other with cogs. The gearings were uncovered, unguarded, and in plain view; but the position of a person tending the machine at which plaintiff stood would bring the gearing on his left hand and somewhat to his rear. There was no machine at the side of the place where he worked on Monday; and in filling the cans at the machine to which he was transferred on Tuesday, the coil was formed upon the top of the can and not upon the floor, that being the usual mode at that machine. While plaintiff was thus engaged on Tuesday, his hand was caught in the machine at the side of the one where he was working, and badly injured. The defendants claimed that a verdict could not be rendered against them because there was no proof that plaintiff when injured was using due care, and secondly, because there was no proof of negligence on their part. The judge withdrew the case from the jury, and reported these two questions for the determination of the full court.

T. D. Elliott and T. M. Stetson, for the plaintiff:

It is the duty of an employer to provide safeguards to protect the employee from unreasonable risks. *Cayzer v. Taylor*, 10 Gray, 274; *Ryan v. Fowler*, 24 N. Y. 410; *Paterson v. Wallace*, 1 Macq. 748; *Bartonshill Coal Co. v. Reid*, 3 id. 266; *Webb v. Rennie*, 4 Fost. & Finl. 608; *Sweeny v. Old Colony & Newport Railroad Co.*, 10 Allen, 368; *Curley v. Harris*, 11 id. 112; *Gilman v. Eastern Railroad Co.*, 13 id. 433.

Inattention, if duly accounted for, or if excused or occasioned by the nature of the employment, is no hindrance to a recovery. *Snow*

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v. *Housatonic Railroad Co.*, 8 Allen, 441; *Spofford v. Harlow*, 3 id. 176; *Johnson v. Hudson River Railroad Co.*, 20 N. Y. 65; *McIntyre v. New York Central Railroad Co.*, 37 id. 287; *Pennsylvania Railroad Co. v. Ogier*, 35 Penn. St. 60; *Quirk v. Holt*, 99 Mass. 164; *Butterfield v. Western Railroad Co.*, 10 Allen, 532; *Miller v. Pendleton*, 8 Gray, 547. The question of negligence is for the consideration of the jury. *Snow v. Housatonic Railroad Co.*, 8 Allen, 441; *Fox v. Sackett*, 10 id. 535; *Paterson v. Wallace*, 1 Macq. 748; *Clayards v. Dethick*, 12 Q. B. 439; *Cowley v. Sunderland*, 6 H. & N. 565; *Holmes v. Clarke*, id. 349; S. C., 7 id. 937. This plaintiff could not be considered capable of appreciating the danger. See *Holmes v. Clarke* and *Cowley v. Sunderland*, above cited, and also *McIntyre v. New York Central Railroad Co.*, 37 N. Y. 287; *Pennsylvania Railroad Co. v. McTighe*, 46 Penn. St. 316; *Connolly v. Poillon*, 41 Barb. 366; *Philadelphia & Reading Railroad Co. v. Spearen*, 47 Penn. St. 300; *Munn v. Reed*, 4 Allen, 431.

The negligence of the defendants was gross, in omitting all appliances for safety. *Cowley v. Sunderland*, 6 H. & N. 565; *Chapman v. Rothwell*, El. Al. & El. 168; *Indermaur v. Dames*, Law Rep., 1 C. P. 274; *Coupland v. Hardingham*, 3 Camp. 398; *Daniels v. Potter*, 4 C. & P. 262; *Elliott v. Pray*, 10 Allen, 378; *Whirley v. Whitman*, 1 Head, 610; *Warren v. Fitchburg Railroad Co.*, 8 Allen, 227; *Miller v. Pendleton*, 8 Gray, 547; *Longman v. Grand Junction Canal Co.*, 3 Fost. & Finl. 736; *Indermaur v. Dames*, Law Rep., 1 C. P. 274; *Clarke v. Holmes*, 7 H. & N. 937; *Cayzer v. Taylor*, 10 Gray, 274. The duty of defendants was greater to a child than to a person of full age. *Sheridan v. Brooklyn City & Newtown Railroad Co.*, 36 N. Y. 39; *Miller v. Pendleton*, 8 Gray, 547; *Munn v. Reed*, 4 Allen, 431; *Philadelphia & Reading Railroad Co. v. Spearen*, 47 Penn. St. 300; *Manley v. St. Helen's Canal & Railway Co.*, 2 H. & N. 840; *Clarke v. Holmes*, 7 id. 937; *Ernst v. Hudson River Railroad Co.*, 32 How. Pr. 61; Stat. 7 and 8 Vict. ch. 15, § 21; *Cayzer v. Taylor*, 10 Gray, 274; *Palmer v. Andover*, 2 Cush. 600, 608.

The plaintiff's counsel cited, in addition to cases above cited by them, to other points, *Bigelow v. Rutland*, 4 Cush. 247; *Ross v. Boston & Worcester Railroad Co.*, 6 Allen, 87; *Meesel v. Lynn & Boston Railroad Co.*, 8 id. 234; *Reed v. Deerfield*, id. 522; *Commonwealth v. Fitchburg Railroad Co.*, 10 id. 159; *Stewart v. Harvard College*, 12 id. 58; *Vinton v. Schwab*, 32 Vt. 612; *Williams v. Clinton*, 28 Conn. 264.

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J. C. Stone, for the defendants:

The fact that plaintiff was under full age does not affect, in any degree, his legal rights or obligations. *King v. Boston & Worcester Railroad Co.*, 9 Cush. 112; *Holly v. Boston Gas Light Co.*, 8 Gray, 123; *Wright v. Malden & Melrose Railroad Co.*, 4 Allen, 283; *Callahan v. Bean*, 9 id. 491. The contrary doctrine of *Lynch v. Nurdin*, 1 Q. B. 29, has always been disavowed by this court, and has recently been rejected in England in *Mangan v. Atterton*, Law Rep., 1 Ex. 239.

Defendants are only responsible for gross negligence. *Durgin v. Munson*, 9 Allen, 396; *McMillan v. Saratoga & Washington Railroad Co.*, 20 Barb. 449; *Priestly v. Fowler*, 3 M. & W. 1.

The employee knew of the defect and continued in the employment. *Assop v. Yates*, 2 H. & N. 768; *Williams v. Clough*, 3 id. 258; *Seymour v. Maddox*, 16 Q. B. 326; *Keegan v. Western Railroad Co.*, 4 Seld. 175; *Coon v. Syracuse & Utica Railroad Co.*, 6 Barb. 243; *Dynen v. Leach*, 26 L. J. (N. S.) Exch. 221; 40 Eng. Law & Eq. 491; *McGlynn v. Brodie*, 31 Cal. 376; *Snow v. Housatonic Railroad Co.*, 8 Allen, 411. Unless, as in *Cayzer v. Taylor*, 10 Gray, 274, and in the cases under the English factory act, the employer had violated a statute requirement.

HOAR, J. This case presents an extremely interesting question, and one of much practical importance, in relation to the duties and responsibilities of employers to those whom they employ. The arguments of counsel have taken a very wide range, and have brought to our notice a very large mass of authorities, which, though we have examined and considered them as carefully as the nature of the case seemed to require, we do not think it necessary to review in detail.

The leading principles of law upon which the rights of the parties depend are simple and well defined, and have been frequently stated in judicial decisions. Thus it is well settled that one who enters the service of another takes upon himself the ordinary risks of the employment in which he engages, including negligent acts of his fellow workmen in the course of the employment. *Farwell v. Boston & Worcester Railroad Co.*, 4 Metc. 49; *King v. Boston & Worcester Railroad Co.*, 9 Cush. 112; *Gillshannon v. Stony Brook Railroad Co.*, 10 id. 228. On the other hand, the principle is perfectly established, that an employer is under an implied contract

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with those whom he employs, to adopt and maintain suitable instruments and means, with which to carry on the business in which he requires their services; and this includes an obligation to provide a suitable place in which the servant, being himself in the exercise of due care, can perform his duty safely, or at least without exposure to dangers that do not come within the obvious scope of his employment. *Cayser v. Taylor*, 10 Gray, 274; *Seaver v. Boston & Maine Railroad*, 14 id. 466; *Snow v. Housatonic Railroad Co.*, 8 Allen, 441; *Gilman v. Eastern Railroad Co.*, 10 id. 233, and 13 id. 433.

There is another class of cases in which it has been held that, if a person allows a dangerous place to exist in premises occupied by him, he will be responsible for injury caused thereby to any other person entering upon the premises by his invitation or procurement, expressed or implied, and not notified of the danger, if the person injured is in the use of due care. *Sweeny v. Old Colony & Newport Railroad Co.*, 10 Allen, 368; *Elliott v. Pray*, id. 378; *Zoebisch v. Tarbell*, id. 385. In the first of these cases, the rule is stated by Chief Justice BIGELOW in these words: "If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such manner that those who are rightfully led to a course of conduct or action, on the faith that the act or duty will be duly and properly performed, shall not suffer loss or injury by reason of his negligence."

It is in the application of these principles to a new state of facts that the difficulty arises; and the case at bar is certainly one that comes very near the line. The plaintiff received the injury of which he complains from his hand being caught in the cogs of a machine, which was running within a foot or two of the place where he was set to tend another similar machine. The work in which he was employed would naturally occasion him to extend his arms and hands in such a manner as to bring his fingers very near to the cogs. But the cogs were in sight, and the danger of getting the fingers into them manifest; and it is argued on behalf of the defendants, 1. That the facts show that the plaintiff did not use due care; and 2. That they were under no legal obligation to fence or inclose the dangerous machinery, or to protect the plaintiff against a peril which, being visible and permanent, came within the risks which he assumed by entering upon the employment.

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Whether it was possible for the plaintiff to have met with the accident from inadvertence or want of acquaintance with the danger of his position, without being chargeable with a want of reasonable care, we think is a question to be submitted to the jury. The facts that he saw or might have seen the machinery in motion, and might have known that it was dangerous to expose himself to be caught in it, are considerations which should be regarded on one side. On the other, some allowance should be made for his youth, his inexperience in the business, and for the reliance which he might have placed upon the direction of his employers. It has been held in other cases that previous knowledge of a danger is not conclusive evidence of negligence in failing to avoid it. *Reed v. Northfield*, 13 Pick. 94; *Whittaker v. West Boylston*, 97 Mass. 273.

Upon the other question reserved, we have entertained more doubt; but upon a careful examination we are all of opinion that there is sufficient evidence to go to the jury upon that also.

There is no statute of this commonwealth which requires machinery to be fenced or boxed, as a precaution against accidents; and most of the decisions under the English statute upon the subject have, therefore, no application. Nor can it be doubted that it is the legal right of every person to carry on a business which is dangerous, either in itself or in his manner of conducting it, if it is not unlawful, and interferes with no right of other persons. The evidence which was introduced to show that the defendants could have guarded their machinery by boxing it, at a very trifling expense, and that they actually did cover it in that way immediately after the accident to the plaintiff, was immaterial. If the plaintiff, being of sufficient age and intelligence to understand the nature of the risk to which he was exposed, and with full notice of the dangerous nature of the service which he undertook, chose to contract to do it, then he assumed the risk which was clearly within the scope of his employment, and his employer was under no obligation to indemnify him against the consequences. Thus in *Priestly v. Fowler*, 3 M. & W. 1, which was an action by a servant against a master for injuries received in consequence of the breaking down of an overloaded van, it was held that the master was not liable, because the fact that the van was over-loaded was as well known to the servant as to him. The implied contract to have the machinery in such a safe and proper condition as not to expose the servant to unnecessary risk is the foundation of the master's liability. If the servant,

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being fully capable of choosing and contracting for himself, and with full notice of the risk which he assumes, chooses to undertake a hazardous employment, to put himself in a dangerous position, or to work with defective or unsuitable tools, machinery or appliances, no such implied contract arises. As was said by Chief Justice COCKBURN in *Clark v. Holmes*, 7 H. & N. 937: "No doubt the master cannot be held liable for injury to the servant within the scope of the danger which both the contracting parties contemplated as incidental to the employment."

The case of *Clark v. Holmes* is one which it is not easy to place upon any very well-defined principle. The plaintiff was an adult workman, who went to work with machinery about him which was properly fenced for his protection. It afterward became unfenced, and he knew its condition, and complained of it to his master, who promised that it should be fenced again. He kept on with his work, and was injured. The jury found that his master was negligent, and that he was not; and his action against his master for compensation for his injury was sustained by the court. Chief Justice COCKBURN says that "there is a sound distinction between the case of a servant who knowingly enters into a contract to work on defective machinery, and that of one who, on a temporary defect arising, is induced by the master, after the defect has been brought to the knowledge of the latter, to continue to perform his service under a promise that the defect should be remedied." Mr. Justice BYLES observed that, the contract being to work with fenced machinery, when it was broken by the master, it might be regarded as a species of compulsion. But he added a remark which seems to point to a distinction of more importance in the case we are considering than in the one in which it was made: "Besides, a servant knowing the facts may be utterly ignorant of the risks."

The case most nearly in point, of any which has been brought to our notice, is *O'Byrne v. Burn*, 16 Cas. in Ct. of Sess. (2d. series), 1025, cited with apparent approbation in *Bartonhill Coal Co. v. Reid*, 8 Macq. 266, and *Same v. McGuire*, id. 300. It was a Scotch case, in which the plaintiff was a girl employed by the defendant in his clay-mill, altogether inexperienced, having been only nine days in his service, and unaware of the risks from the machinery. The superintendent put her to remove some waste clay while the rollers were in motion, and she was injured; and it was held that she could maintain her action. Lord CRANWORTH's comment upon

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it is in these terms: "This might have been quite right. It may be, that, if a master employs inexperienced workmen, and directs them to act under the superintendence and obey the orders of a deputy whom he puts in his place, they are not, within the meaning of the rule in question, employed in a common work." "They are acting in obedience to the express commands of their employer, and if he, by the carelessness of his deputy, exposes them to improper risks, it may be that he is liable for the consequences." 3 Macq. 295. And Lord CHELMSFORD adds: "It might well be considered that, by employing such a helpless and ignorant child, the master contracted to keep her out of harm's way in assigning to her any work to be performed." Id. 311.

The case of *Indermaur v. Dames*, Law Rep., 2 C. P. 311, furnishes a slight analogy to the present. A gas-fitter's man was sent to the defendant's factory to inspect meters, and was hurt by falling down an unfenced shaft. It was held that he was not a mere volunteer, but came upon the premises under such conditions that he was entitled to protection against an unknown danger. KELLY, C. B., said, in delivering the opinion in the exchequer chamber, "If a person occupying such premises enters into a contract, in the fulfillment of which workmen must come on the premises who probably do not know what is usual in such places, and are unacquainted with the danger they are likely to incur, is he not bound to put some fence or safeguard about the hole, or, if he does not, to give such workmen a reasonable notice that they must take care and avoid the danger? I think the law does impose such an obligation on him."

Upon the new trial of the case at bar, the jury should be instructed that the defendants had the legal right to run their machinery without fencing or boxing it, unless by so doing they exposed persons in their employment, or other persons who came upon their premises by their procurement or invitation, to danger of which they gave no sufficient notice; that if, by the fact the cogs were in sight, and the danger from them apparent, the jury should be satisfied that the plaintiff had reasonable notice of the peril to which he was exposed, and, understanding it, chose to undertake the employment which exposed him to it, he cannot recover; but that, if, on the other hand, they should be satisfied that the defendant knew, or had reason to know, the peril to which he would be exposed, and did not give him any sufficient or reasonable notice of it, and if he, without any negligence on his own part, from inexperience or reli-

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ance upon the directions given him, failed to perceive or appreciate the risk, and was injured in consequence, they would be responsible to him in this action.

Case to stand for trial.

The case was accordingly tried at April term, 1869, before WELLS, J., and, after a verdict for the plaintiff, was again reported for the revision of the full court, and the verdict sustained.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

EMPIRE TRANSPORTATION Co., appellants, v. WAMSUTTA OIL Co.

(68 Penn. St. 14.)

Common carrier — liability notwithstanding special contract.

An oil company shipped a quantity of oil by the Empire Transportation Co., under a condition, set forth in the receipt, that the oil company should assume all risk, and the transportation company should be released from all responsibility for loss or damage. The car containing the refined oil was coupled in a train to one containing crude oil, which took fire from sparks from the engine, and, on account of a defect in the coupling, could not be separated from the car of refined oil, and both were consumed. *Held*, that the transportation company was liable, notwithstanding the condition in the receipt.

ACTION on the case to recover for the loss of a quantity of refined oil burned in course of transportation on the defendants' cars. The Wamsutta Oil Refining and Mining Company shipped sixty-seven barrels of refined oil in the cars of the Empire Transportation Company, and took a receipt containing a condition as follows: "The owner or consignee (in consideration of the extremely hazardous nature of such merchandise, which is not covered by any extra charge for transportation) hereby assumes all risk for leakage, evaporation, and loss by fire while in transit, or at depots or in stations, or on board boats, vessels or lighters, from any cause whatever, and all dangers and delays of railroad and water transportation

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to destination, and in any claim or demand, suit at law or equity, against this company or transportation company or agent, for loss or damage thereby, this bill of lading shall be deemed and taken as a release in full therefor." The refined oil was placed in a train composed partly of refined and partly of crude oil; and on the 10th of March, 1868, while this train was being conveyed over the road of the Empire Transportation Company, one of the crude oil cars took fire from sparks from the engine, and before the next car, which contained the oil company's refined oil, could be detached, the fire communicated to it and the oil was consumed. Said oil company then brought action against the Empire Transportation Company for damages. On the trial it appeared that the reason why the refined oil car could not be detached from the burning crude oil car was, that the coupling iron had been jammed so that the pin could not be drawn. It appeared also, that refined oil, standard, like that shipped by defendants' cars, would not ignite below 110 degrees; and that crude oil would ignite at 65 degrees; also that it was usual to carry crude and refined oil in the same train. The case went to the jury on the question whether the loss to plaintiff was in consequence of the defective coupling; and this point being affirmed, judgment was rendered for plaintiffs for \$678.18; and defendants appealed.

J. Ash and S. C. T. Dodd, for plaintiffs in error, cited *McCully v. Clark*, 4 Wright, 399; *Pennsylvania Railroad Co. v. Oxier*, 11 Casey, 60.

C. Heydrick, for defendant in error.

SHARSWOOD, J. As a common carrier cannot, by a special notice or limitation in the contract or bill of lading, protect himself from liability for the negligence of himself or his servants (*Pennsylvania Railroad Co. v. Henderson*, 1 P. F. Smith, 315), the only question in this cause was, whether the defendants had been guilty of such negligence. The error assigned is, that the court below took that question from the jury, by affirming the plaintiff's second point, by which they were instructed that, if they were satisfied that certain facts were proved, the plaintiffs were entitled to recover. The rule upon this subject was very clearly laid down in *McCully v. Clarke*, 4 Wright, 399, in which it was said: "There are some cases

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in which a court can determine that omissions constitute negligence. There are those in which the precise measure of duty is determinate, the same under all circumstances. When a duty is defined, a failure to perform it is, of course, negligence." Other cases fully corroborate this doctrine. *Powell v. Pennsylvania Railroad Co.*, 8 Casey, 414; *Pennsylvania Railroad Co. v. Ozier*, 11 id. 60; *Pittsburg & Connellsville Railroad Co. v. McClurg*, 6 P. F. Smith, 294; *Glassey v. Hestonville Passenger Railway Co.*, 7 id. 172.

The duty of a common carrier is, to provide a vehicle in all respects adapted to the purposes of carriage, and so constructed as to be able to encounter the ordinary risks of transportation. Story on Bail, § 509. It must be perfect in all its parts, in default of which he becomes responsible for any loss that occurs in consequence of any defect, or to which it may have contributed. *Hart v. Allen*, 2 Watts, 114; *New Jersey Railroad Co. v. Kenard*, 9 Harris, 204. When merchandise, of whatever character, is carried on the same railroad train with cars loaded with a combustible substance, easily ignited by sparks from the locomotive engine—it is the special duty of the carrier to take every available precaution against the communication and spreading of the fire, if it should occur. An evident and simple measure is, to have the coupling of the cars in such perfect order that any one or more of them can be easily detached from the others in time to be saved from the consequences. If the fact is that the coupling was defective, unless such defect was the result of an inevitable accident, and, in consequence of it, the car containing the plaintiffs' merchandise could not be detached in time to be saved, the negligence and liability of the carrier are inferences of law, from the facts.

But it is said that the *onus* in this case was on the plaintiffs below, to show that the defect of the coupling arose from the negligence or want of care of the defendants. We think not. When the carriage is proved to have been defective at the time of the injury, and that the defect contributed to the loss, the *onus* is then necessarily shifted to the carrier. He must rebut it by evidence that the defect arose, not from the insufficiency of the vehicle into which the goods were loaded, but from some subsequent accident beyond his control. This puts the burden where it ought most properly to rest. The carrier ought to be able to show, with ease, by his servants, that the vehicle was inspected before the commencement of the trip, and every thing found to be in good order. It would be

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very difficult for the plaintiffs to prove the contrary—that it had not been examined, or that it was in bad order when it started. On the trial of this case, in the court below, there was no evidence to show when or how the links of the coupling of the cars became jammed, so that they could not be separated in time. It was surmised by one of the witnesses, that it must have got into that shape by going around a curve. Even admitting this to be so, the important question remains unanswered, and which it was incumbent on the carriers to answer, when did this occur? Had it been shown to have happened during the course of the same trip in which the fire took place, and that it was not known to, or discovered by, the carriers or their servants in time to be remedied, then, indeed, there might have been a question of negligence for the jury. But without any evidence as to this point, there was nothing for them but that which was submitted, whether the coupling of the car was defective, and that defect contributed to produce the loss.

Judgment affirmed.

PAULL, appellant, v. HALFERTY.

(68 Penn. St. 46.)

Slander of title—iron mine in land.

H. was prevented from making an advantageous sale of lands belonging to him and containing an iron ore mine, by the misrepresentations of P. to the proposed buyer, to the effect that an experienced iron manufacturer was of opinion that the iron mine was but a “pocket,” or nest that would suddenly run out. *Held*, that H. could recover damages from P. in a suit in the nature of an action of slander for defamation of title.

ACTION in the nature of an action of slander for defamation of title by Halferty plaintiff, against Paull, defendant, September 8, 1866. The plaintiff was the owner of a tract of land containing an iron ore mine for the sale of which he was negotiating with McLoughlin, when Paull, knowing the land, interfered and sent the following letter to McLoughlin, which terminated the negotiations:

“As we parted the other day you said something of buying the tract of land containing the ore mine. Now, in order that you may be fully posted before purchasing a ‘pig in a poke,’ I will give you

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Col. Mathiot's opinion of that iron ore deposit. Col. Mathiot, a shrewd, practical man, well known in Pittsburg, who managed this furnace for thirty years, considered it an isolated 'pocket' 'or nest,' as miners call them, that would run out suddenly, and this he gave for as one reason for always using it, in connection with other ore (to save it); but at the same time they found that the furnace worked better on mixed ore.

"And when, some five years ago, I inquired of him, how he came to let that tract be sold for taxes? he replied that he had got all the timber off it, and thought the ore was nearly played out, and, although I thought he was mistaken, he said he was sustained by Arthur Harrison, a miner, who had worked in it. I have not mentioned this before to any one."

The defendant made the following points at the trial:

"Land is not the subject of defamation, as offices, trades, professions and titles are, because the land itself is a standing refutation of any false statements in regard to it, so that it cannot be injured by them.

"If the plaintiff in this case sustained any injury from the loss of his bargain, his remedy is against J. Y. McLoughlin for non-performance of his contract to purchase the land for the price agreed upon."

The court ruled against the former point, and to the latter made the following answer;

"Although plaintiff might have a cause of action against McLoughlin, it would seem it does not follow that he could not also support an action against Paull. It is not a case of election or choice of remedies, but being of a separate character both might be sustained. We therefore answer this in the negative."

Verdict for plaintiff for \$997.50, judgment thereon, and an appeal therefrom by defendant.

E. Cowen (with him were *J. A. Hunter* and *H. D. Foster*) for plaintiff in error, cited *Good v. Mylin*, 8 Barr, 56; *McNair v. Compton*, 11 Casey, 23.

H. P. Lord (with him was *Merchand*) for defendant in error.

THOMPSON, C. J. This was an action in the nature of an action of slander for defamation of title. The *narr.* charges the defendant

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with falsely and maliciously misrepresenting the quality of a certain tract of land supposed to contain a large body of iron ore of which the plaintiff alleges he was about to make an advantageous sale, but was prevented by the malicious conduct of the defendant.

A point was propounded to the court below by the counsel of the defendant, praying a charge that "land is not the subject of defamation, as offices, trades, professions and titles are, because the land itself is a standing refutation of any false statements in regard to it, so that it cannot be injured by them." This the learned judge refused.

The point concedes that an action will lie for defamation of title. The authorities for that are numerous: Cro. Eliz. 196, 427; Cro. Jac. 484; Kel. 153; Styles' Rep. 169; 54 Eng. C. L. 830; to which many others might be added.

It might be true that land cannot be so misrepresented as to be the subject of damages where the reference is to its patent qualities. I fancy that a statement, however malicious, that land is without timber, when notoriously well timbered, could never be the subject of damages. But very different would be the case of those occult qualities or internal values which science and experience may be able to detect. As they never, or very rarely, can be certainly ascertained, and to some extent must rest upon opinion, it seems to me that the case is different. One may know more in regard to the value than others, and if, knowing or believing the condition to be one thing, and representing the facts in a different light and prejudicial to the owner, he does him an injury, he ought to pay the damages his misrepresentation produces, or is the direct cause of.

The representation in this case was, that an experienced iron manufacturer was of opinion that the iron ore in the land was but a "pocket" or nest, that would suddenly run out, and that he had used ore from the bank with other ores, in order to save it. This was a most successful mode of depreciating the value of the land as mineral land, and if this was false and malicious as well as injurious to the plaintiff, why shall he not be indemnified? The defendant did not pretend to prove that Col. Mathiot ever did say what he imputed to him, or that the fact, independently of him, was true. The witness, the party in treaty for the land, says, that in consequence of this communication from the defendant, having confidence in him, he refused to go on with the purchase, and thus the matter ended. As the use of the words in question was not *in se* actionable,

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the plaintiff proved their falsity, so far as observation, experience, judgment and the declarations of the defendant could go. This made a case for the jury, and it would, we think, have been manifest error in the judge to have affirmed the defendant's point.

It would hardly be denied, I think, if one were falsely and maliciously to represent that a piece of land and residence which a neighbor was about to sell was very unhealthy, and thus break off an advantageous sale, that this would be actionable, if damage was shown.

For misrepresenting personal qualities, such as the imputation of the want of chastity, by which an advantageous marriage was lost, an action lies, although the words employed may not, in themselves, be actionable. *Moody v. Baker*, 5 Cow. 351, is of this sort, and there are many such in the books. For falsely representing a ship as unseaworthy, an action lies. *Ingram v. Lawson*, 9 Car. & P. 326. This, although the seaworthiness of the vessel might be claimed as "a standing refutation" of the slander, being a thing easily ascertained, I regard the text of Starkie on Slander, p. 172, ed. of 1869, as quite to the point in a case of this kind. It is there said, "where a party is prevented from selling, exchanging, or making any advantageous disposition of land or other property, in consequence of the impertinent interference of the defendant, he may maintain an action for the inconvenience he has suffered." Burrall, 2622, is cited for this by the learned author. With all these analogies and principles to sustain the ruling of the learned judge, we think he committed no error in answering the defendant's first point as he did.

In regard to the second assignment of error, which is the answer of the learned judge to the defendant's second point, much need not be said. It seems to us, that if the law, in answer to it, were wrong to any extent, the facts did not raise the question. The defendant's testimony did not refer at all to any completed contract of purchase by McLoughlin from the plaintiff, but he claimed it to have been shown by the plaintiff. But when we look at that, we discover nothing like a contract with any time for performance, and necessary details on either side, even by parol. The preliminaries to a contract were spoken of, nothing more, and this the defendant seemed to understand, for he interposed his notice not to buy a "pig in a poke" in order to prevent its completion. A contract for the sale of land is not made by a statement of the price asked and an answer "that I will take it," as said in this

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case. Arrangements are to be made, as to how and when to be paid, when the conveyance, and what kind of conveyance, is to be made, and then the reduction of the contract to writing and signing it, at least, by the party who is to convey. There was neither a parol nor written contract in evidence in this cause; such an one as a court would have allowed to have gone to a jury as a binding contract for the sale of land. I admit that if there had been a binding contract between the plaintiff and McLoughlin, for the land, and then the latter had refused to comply with his contract on account of the defamatory representations received, the authorities show that the plaintiff's remedy would have been on the contract for damages. This is very clearly asserted by Lord ELDON, C. J., in *Morris v. Longdale*, 2 Bos. & Pul. 283; see, also, *Vicars v. Wilcocks*, 8 East 1; and *Bailey v. Drew*, 5 Barb. 297. But we need not enlarge; if there were error in this answer, it was innoxious, as the proof did not raise the point.

The learned court entered judgment on the verdict, although it had reserved the question, whether, under all the facts, the plaintiff was entitled to recover. This was certainly insufficient as a point reserved (*Clark & Thaw v. Wilder*, 1 Casey, 314), and the plaintiff in error cannot ask a review here of any thing but what he took exceptions to on the trial. We have, however, discussed all the questions in the case.

Judgment affirmed.

BROWN, appellant, v. CLEGG.

(68 Penn. St. 51.)

Liability of tow-boats.

In Pennsylvania steam tow-boats or tugs are not common carriers as regards the vessels they have in tow and their cargoes.

ACTION in assumpsit by Clegg against Brown, commenced Aug. 1, 1867, for charges for towing seven loaded coal-barges from Pittsburgh to Cairo, and towing the empty barges back to Pittsburgh. The contract was for towing eight barges; but when the steam-tug, "Mary Davage," belonging to plaintiff, had towed them as far as Steubenville bridge, one of the barges was driven against the pier and

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sunk, and only the seven were delivered ; wherefore the defendant refused to pay the charges.

At the trial the defendant requested the following charges:

1. "That when the owner of a steam-tug undertakes the business and employment of towing loaded coal-boats or barges from Pittsburg down the Ohio river to a distant market, and in such an undertaking is to have the exclusive possession and control of the tow, the owner of which is not to be present by himself or his agents throughout the trip, such owners will, in such undertaking, be liable as a common carrier, in the absence of any special agreement to the contrary."

2. "If this point be declined, then that in such case, if, in mid-day and on an open river, the tug should collide against the pier of a bridge and sink one of her barges in tow, not from any sudden unforeseen accident, or from any inevitable cause, but from the pilot's having gradually lost the control of his boat and tow, under the usual and ordinary action of the wind and currents, the owners of the tug would be liable for the loss of the barge."

3. "Or if declined, then that the liability of the tug-boat owner in this case would be similar in extent to that of a common carrier under a bill of lading, with usual exception against the perils of navigation, which would not excuse a collision in open day with a well-known obstruction, as the pier of a bridge, there having been no sudden or unforeseen act or violence of a nature which caused the collision."

4. "That when a steam-tug undertakes to tow a large fleet of loaded coal-boats down the Ohio river, as in this case, and just when arriving at the Steubenville bridge, well known as a dangerous place, where more than ordinary care and skill is requisite in management of the tow, the captain and one of the pilots go down to their dinner, leaving only one pilot and the mate on deck to manage the tow and carry it by the dangerous place, and the boat under the management, or mismanagement, of the pilot and mate, strikes one of the bridge piers and sinks one of her barges, the owners of the tug would be liable to the owner of the barge for its loss."

5. "If the court declined the charge as requested in the last point, then, that under the circumstances there detailed, the owners of the tug would be so liable, unless they show affirmatively and clearly that the accident arose from some sudden and unforeseen cause which human skill and foresight could not have provided against."

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6. "That the facts in evidence are insufficient in law to excuse the plaintiffs for the loss of the barge."

The court denied the first, fourth and sixth requests, and as to the others charged as follows:

2. "The court declines to affirm this point without qualification. If the pilot 'gradually lost the control of his boat and tow,' without any want of proper and reasonable care and skill on his part, then the owners of the tug would not be liable for the loss of the barge; but 'if the pilot' gradually lost the control of his boat and tow 'through any negligence or want of proper and reasonable care and skill on his part,' then the owners of the tug would be liable for the loss of the barge, under the facts stated in the point."

3. "The court declines to charge as requested in this point. Whether the loss of the barge was occasioned by the perils of the navigation or by the negligence, want of skill and care on the part of the pilot and crew of the tug, is a question of fact for the determination of the jury, and not a matter of law for the decision of the court."

5. "Omitting the words 'sudden and unforeseen' before the word 'cause,' the point is affirmed."

Verdict for plaintiffs for \$2554.07. The defendant appealed.

H. Burgwin, for plaintiff in error, cited *Angell on Carriers*, §§ 77, 129, 152; *Riley v. Horne*, 5 Bingh. 217; *Germania Ins. Co. v. Pike*, 8 Am. Law Reg., October, 1869, p. 614.

J. Barton and *R. Woods*, for defendants in error, cited *Hays v. Paul*, 1 P. F. Smith, 134.

READ, J. Are steam tow-boats common carriers in respect to the boats they have in tow, is a question of great importance in this State, and is distinctly presented for our consideration in this case. The distinction attempted to be drawn in the points presented to the court would seem to take for granted that in all other species of towage the owners of steam-tugs are not common carriers, but are responsible only for ordinary skill, care and diligence in their undertaking. The effort then is to make the owners of tugs, towing loaded coal-boats on the Allegheny, Monongahela, Ohio, Delaware and Schuylkill rivers, insurers of the boats and their cargoes towed by them; and legally responsible for all acts against which they

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could not provide, from whatever cause arising, the acts of God and the public enemy only excepted.

The common-law rule applied only to goods, and not to vessels or boats, to which it cannot be extended except by a forcible perversion of its terms and meaning. Towage by steam is a different and new business, to which should be applied the ordinary rules of bailees for hire, and this has been the clear understanding of the community in this State.

In *Leech et al. v. The owner of the steamboat Miner*, 1 Phila. 144, the action was for the loss of two boats loaded with coal, alleged to have been lost by the carelessness of the defendant, who had undertaken to tow them from the mines on the Monongahela, to the landing at Pittsburgh.

LOWRIE, J. (1st of March, 1848) charged the jury, "That the owners of a tow-boat are not liable, as common carriers, for the safety of the boats and their contents, which they undertake to tow. In the performance of the duty, they are bound to exercise ordinary care and skill in directing their movements, and are liable if the accident arose from such want of care and skill."

In *Leonard v. Hendrickson*, which was the case of a raft taken in tow by a steamboat, HEPBURN, J., in the same court in the next year (1849), held that the owners of the boat were not common carriers. This case was taken to the supreme court and there affirmed, and is reported in 6 Harris, 40.

A very able opinion was delivered by CHAMBERS, J., considering the question upon reason and authority, rejecting the Louisiana doctrine, and adopting the New York rule as unanimously laid down by court of appeals in *Wells v. Steam Navigation Company*, 2 Comst. 207.

In *Hays v. Paul*, 1 P. F. Smith, 134, the court below affirmed the defendant's point "that the owners of a steamboat, employed in towing boats, are not common carriers, and are only bound to take such reasonable degree of care and attention, that the owner of the boat or raft towed shall incur no damage or loss through the negligence or default of the owner of such steamboat, or of his servant." The case was tried and decided upon this principle, and affirmed by the supreme court.

It appears, therefore, to be the settled rule in Pennsylvania, that the owners of steam tow-boats are not common carriers.

I am aware of the opinion of KANE, J., in *Vanderslice v. The*

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steam tow-boat Superior, in admiralty, in the district court of the United States for the eastern district of Pennsylvania, reported in 2 Am. L. J. (N. S.) 347, and in 13 Law Rep. 399. The learned judge agrees with Chancellor KENT, and disagrees with STORY, J., and with the case in 3 Hill, 9, in holding steam-tugs common carriers. After stating various reasons for considering them common carriers, he says, "these considerations urge us very strongly, to hold the steam-tug to the rigid accountability of a common carrier, but I do not think it necessary to decide the question."

There is no date to this opinion, but as the libel was for damage done to a boat and her cargo in March, 1846, and as neither the case in 7 Hill, 533, nor that in 6 Harris, 40, are referred to, it must have been prior to the publication of those cases, the last of which would have had a controlling influence over the mind of the judge. In 1 Wharton's Dig. (6th ed. 1853) 203, under the head of Bailment 1 — *Common Carrier*, part 11, the digester, after stating the case of *Vanderslice v. The Superior*, as if it had been a positive decision that a steam-tug towing boats for hire was a common carrier, adds: "This case was affirmed on appeal to the circuit court by GRIER, J., on the ground that there had been a want of ordinary care on the part of the steam-tug, but he declined to rule that she was a common carrier."

In the supplement of Wharton's Digest published in 1865, under the head *Bailments*, page 42, "who are common carriers?" "3. Steam-tugs are not liable as common carriers for the safety of vessels which they are towing, or of their cargo. *Hinter v. Steam-tug Enterprise*; *Hinter v. The Steamer Napoleon*, 3 Wall. 5." It is clear the dictum of KANE, J., did not form the grounds of decision in the case before him, nor of any other case in the third circuit, so far as we know. The decisions on this point in the State courts, and in those of the United States, entirely harmonize.

In *Merrick v. Brainard*, 38 Barb. 574–585 (1860), the court say, "one who contracts to tow a boat laden with merchandise, for another, is not a carrier and does not assume, nor is he charged with the duties and responsibilities of a carrier. *Wells v. Steam Navigation Co.*, 2 Comst. 204. In the same case (4 Seld. 375), it was held, that the owners of a tow-boat, in the absence of an express contract limiting their liability, are bound to exercise ordinary care and diligence, and are liable for the want thereof."

In the court of appeals in *Merrick v. Van Santvoord et al.*, 34 N. Y

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(7 Tiff.) 208 (1866), this case was modified by reversing the judgment of the court below, as to the defendant Van Santvoord, who had been held liable as a mere stockholder in a Connecticut corporation, but affirming the judgment as against the defendant Brainard, upon the principle just stated. "We have examined the questions raised by the appeal which affect the defendant Brainard, and think the judgment as to him should stand for the reasons assigned in the court below," in which all the judges concurred.

BETTS, J., in *Abbey v. Steamboat R. L. Stevens*, 22 How. Pr. 78, in the district court of the United States for the southern district of New York, in September, 1861, said: "The tug is not to be regarded subject to the liabilities of a common carrier or insurer." The decision in *The Princeton*, 3 Blatchf. C. C. 54, by NELSON, J., one of the judges who decided the case of *Alexander v. Greene*, 3 Hill, 9, looks in the same direction, and can bear no other interpretation. In *The Steamboat Angelina Corning*, 1 Ben. 109, BENEDICT, J., of the United States district court for the eastern district of New York, in 1867, held that a steam-tug is not a common carrier of the vessel she tows.

In *The Steamer New Philadelphia*, 1 Black. 62, it seems to have been taken for granted, in the district and circuit courts, and in the supreme court, that the steam-tug New Philadelphia was not a common carrier of the coal-barge she had in tow, and the ground of claim by the libellant for the damages to the tow was, that they were occasioned by negligence and want of ordinary skill, care and prudence on the part of those who were intrusted with the navigation of the tug.

It may, therefore, be affirmed, that by the law of Pennsylvania, and also of New York, as administered by the courts of those States, and by the courts of the United States in the second and third circuits, steam-tugs or boats are not common carriers of the vessels they tow.

The cases in England are generally in the admiralty, which has jurisdiction of towage, and which is often connected with salvage. In *Symonds v. Pain*, 6 Hurlst. & N. 709, which was an action by the owner of a smack, against the owners of a steam-tug employed to tow his smack out of the harbor, for negligence of the master of the tug, by which the smack was stranded, the declaration was in the common form for negligence in towing the plaintiff's vessel out to sea. The defense set up was a special notice on the back of the

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printed receipts given by the defendants, exempting them from all liability for any loss or damage whether arising from, or occasioned by, any supposed negligence or default of them or their servants, and the question was, whether the plaintiff had knowledge of this notice. The Lord Chief BARON expressed the opinion that the contract was upon the terms of the notice, and that it was evident the defendants did not undertake for the charge of seven shillings and sixpence to be insurers against accidents to the vessels they towed — and the plaintiff was then nonsuited. Upon a motion for a new trial in showing cause, defendants' counsel said: "This is not the case of a common carrier. There was no common-law obligation on the defendants to tow the plaintiff's vessel, but the liability depends on contract."

Baron MARTIN said: "I am of opinion that it was a question for the jury, what was the contract the plaintiff and defendants entered into, and that it was not a question of law for the judge to decide. Whether the plaintiff had knowledge of the notice by reason of having the receipts was essentially a question of fact, and ought not to have been withdrawn from the consideration of the jury" — a new trial was granted; and upon a second trial before ERLE, C. J., the learned judge left it to the jury to say whether the contract between the plaintiff and defendant was made on the terms printed on the back of the receipts, and the jury having found in the affirmative, plaintiff elected to be nonsuited.

In *The Minnehaha*, 1 Lush. 335, and in the judicial committee of the privy council, Lord KINGSDOWN said: "When a steamboat engages to tow a vessel for a certain remuneration from one point to another, she does not warrant that she will be able to do so, and will do so, under all circumstances and at all hazards; but she does engage that she will use her best endeavors for that purpose, and will bring to the task competent skill; and such a crew, tackle and equipments as are reasonably to be expected in a vessel of her class. She may be prevented from fulfilling her contract by a *vis major*, by accidents which were not contemplated, and which may render the fulfillment of her contract impossible, and in such case, by the general rule of law, she is relieved from her obligations. But she does not become relieved from her obligations because unforeseen difficulties occur in the completion of her task; because the performance of the task is interrupted or cannot be completed in the mode in which it was originally intended — as by the breaking of the

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ship's hawser. But if in the discharge of her task, by sudden violence of wind, or waves, or other accidents, the ship in tow is placed in danger, and the towing vessel incurs risks and performs duties which were not within the scope of her original engagement, she is entitled to additional remuneration for additional services, if the ship be saved, and may claim as a salvor, instead of being restricted to the sum stipulated to be paid for mere towage." In the cases on this subject the towage contract is generally spoken of as superseded by the right to salvage. In the case of *The Julia*, in the judicial committee of the privy council, 11 Moore P. C. 210, 1 Lush. 224, Lord KINGSDOWN said: "When the contract was made, the law would imply an engagement, that each vessel should perform its duty in completing it, that proper skill and diligence would be used on board of each, and that neither vessel, by neglect or misconduct, could create unnecessary risk to the other, or increase any risk which might be incidental to the service undertaken.

So where a steam-tug, to avoid being crushed by collision, let go her tow and slipped out from between the two vessels, and dropped astern, "It was admitted on all sides that this maneuver was perfectly justifiable." *The Annapolis*, P. C., 5 Law Times R. 38.

It is clear from these authorities that steam tow-boats or tugs are not, by the law of England, common carriers, of the vessels they tow. The cases in the United States which are supposed to express a contrary opinion are *White v. Mary*, 6 Cal. 462, October term, 1856, where Justice HEYDENFELDT, delivering the opinion of the court, says: "It is immaterial to consider whether the defendant was or was not a common carrier, although I think she was, according to the most striking analogies;" *Walston v. Myers*, 5 Jones (N. C.) 174, December, 1857, where Judge PEARSON said: "We are inclined to the opinion, that the defendants, John and Redding Myers, the owners of the steamboat, were common carriers, in respect to the plaintiff's flat they had in tow."

In *Ashmore v. Penn. Steam Towing Trans. Co.*, 4 Dutch. 180, one judge, upon a motion for a new trial, deemed it unnecessary to decide whether a tower was a common carrier. Another judge held, both upon principle and authority, that he was not a common carrier. A third seemed to be of the opinion that he was a common carrier; and the chief justice, who had tried the cause, and who had not charged the jury that the steamboat was a common carrier, concurred with the majority in dismissing the motion for a new trial.

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In *Sproul v. Hemmingway*, 14 Pick. 1, a brig which was towed at the stern of a steamboat, employed in the business of towing vessels in the river Mississippi, below New Orleans, was, through the negligence of the master and crew of the steamboat, over whom those in charge of the brig had no control, brought into collision with a schooner lying at anchor. It was held, that the owner of the brig was not responsible for the damage sustained by the schooner. There is nothing in this case showing that the court regarded the steamboat as a common carrier, and this is remarkable because the case of *Smith v. Pierce*, 1 La. 349, in which the owners of steam tow-boats on the Mississippi were held liable as common carriers, had been decided in May, 1830, and published in 1831, two years before the decision of the Massachusetts case.

Of the text-writers, Story on Bailments (7th ed. § 496), says: "The owners of a steamboat, who undertake to tow freight-boats for hire, or undertake to tow vessels in or out of port for hire, are not common carriers, but are responsible only for ordinary care, skill and diligence in their undertaking." Such is the opinion also expressed in Angell on Carriers (4th ed. 1868, § 86).

And in 1 Parsons on Shipping and Admiralty, page 247, it is said "steam tow-boats are not generally considered common carriers in respect to the boats they have in tow."

The detailed examination we have made of the authorities upon this point shows conclusively that in Pennsylvania the law is definitely settled that steam tow-boats or tugs are not common carriers as regards the vessels they have in tow, and their cargoes. There is nothing in any of the other specifications of error, and the judgment is therefore affirmed.

Mundorff v. Wickersham.

MUNDORFF, appellant, v. WICKERSHAM.

(68 Penn. St. 81.)

Liability of principal for unauthorized acts of agent.

Defendant's agent, in procuring plaintiff's promissory note, signed a receipt in the name of his principal, containing an undertaking that the note should be protected at maturity. He was not authorized to sign such a receipt; but defendant used the note in his business, and plaintiff was obliged to pay it at maturity. *Held*, that defendant was liable on the contract contained in the receipt.

ACTION in assumpsit, to recover the amount of a note which defendant had agreed to protect at maturity but plaintiff had been obliged to pay. The note and receipt forming the basis of the action are as follows:

" \$800.

PITTSBURG, November 29, 1858.

" Four months after date, I promise to pay to the order of S. M. Wickersham, \$800, without defalcation, for value received.

" G. A. MUNDORFF."

" PITTSBURG, November 29, 1858.

" We received of G. A. Mundorff his note, calling for \$800, payable to the order of S. M. Wickersham, dated November 29, 1858, which we are to protect at maturity.

" JAMES VANDERGRIFF,

" For S. M. WICKERSHAM."

It appeared that defendant had told Vandergriff to call on plaintiff for the note; that he did so, and got the note, whereupon plaintiff drew the receipt and Vandergriff signed it. Vandergriff testified that he did not owe defendant, and did not know whether plaintiff owed defendant, and that he had no authority to sign the receipt as he did. Judgment of nonsuit and plaintiff appealed.

B. F. Lucas (with him was *A. G. Lucas*), for plaintiff in error, cited *Bevan v. Insurance Co.*, 9 W. & S. 187.

SHARSWOOD, J. If an agent obtains possession of the property of another, by making a stipulation or condition which he was not authorized to make, the principal must either return the property,

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or, if he receives it, it must be subject to the condition upon which it was parted, with by the former owner. This proposition is founded upon a principle which pervades the law in all its branches: *Qui sentit commodum, sentire debet et onus*. The books are full of striking illustrations of it, and more especially in cases growing out of the relation of principal and agent. Thus, where a party adopts a contract which was entered into without his authority, he must adopt it altogether. He cannot ratify that part which is beneficial to himself and reject the remainder; he must take the benefit to be derived from the transaction *cum onere*: Broom's Legal Maxims, 632; *Hovil v. Pack*, 7 East, 164; *Coleman v. Stark*, 1 Oregon, 115. In the familiar case of the sale of a horse by a servant, who, without authority, warrants the soundness of the animal, the master having received the price enhanced by the warranty, even though ignorant of it, is responsible. *Nelyear v. Hawke*, 5 Esp. 72; *Alexander v. Gibson*, 2 Campb. 555; *Williamson v. Canaday*, 3 Ired. 349. Where the agent of the insured, in effecting an insurance, makes a false and unauthorized representation, the policy is void. Where one of two innocent persons must suffer by the fraud or negligence of a third, whichever of the two has accredited him ought to bear the loss. *Fitzherbert v. Mather*, 1 T. R. 12. The holder of a note is responsible for representations made by a broker employed to sell it, though contrary to his instructions. *Lobdell v. Baker*, 1 Metc. 193. A principal who sues to enforce a contract is bound by the representations made by his agent, in order to induce the opposite party to make it. *Bennett v. Judson*, 21 N. Y. 238; *Elwell v. Chamberlain*, 4 Bosw. 320; 31 N. Y. 611. So a debtor cannot have the benefit of a compromise and release, effected by his agent, without adopting all the representations made by the agent to the creditors in negotiating it. *Crans v. Hunter*, 28 N. Y. 389. If an agent borrows money for his principal, and procures another to become surety, and the surety afterward pays the debt, the principal is answerable to the surety. *Higgins v. Dillinger*, 22 Miss. 397. There is a very strong case in *Barber v. Britton*, 26 Vt. 112, where the defendant sent a servant to employ the plaintiff, who was a physician, to visit a boy who had been injured in their service, and directed him to tell the plaintiff that they would pay for the first visit. The servant neglected to mention this, and employed the plaintiff generally. He attended the boy until he recovered, and the defendants were held liable for his whole bill. Many of

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these cases are put upon an implied authority, but the more reasonable ground, as it seems to me, is, that the party, having enjoyed a benefit, must take it *cum onere*.

The defendant in this case received a note signed by the plaintiff, which was delivered to the defendant's agent, upon the faith of an undertaking that he would protect it at maturity. He has enjoyed the benefit of the transaction. He used the note in his business, and doubtless received the proceeds of its discount. The plaintiff has been obliged to pay it at maturity, as his possession of the note, with the defendant's indorsement, proves, at least, *prima facie*. He is now seeking to enforce the contract evidenced by the receipt. Why shall not the defendant bear the burden of the transaction, as he has received the benefit? If the note was not an accommodation note, but founded on value; if the plaintiff did owe the defendant the amount of it, and the defendant was not bound to protect it at maturity, then there was a palpable fraud committed by the plaintiff, in requiring the agent to sign such a receipt, and this would be a full defense to the action.

Judgment reversed, and procedendo awarded.

HEATH, appellant, v. PAGE.

(68 Penn. St. 103.)

Usurious loan — attachment of proceeds of fraudulent sale of land.

H. loaned money to P. at a usurious rate of interest, and after the usury was consummated, H., with intent to defraud his creditors, conveyed land, without consideration, to G., who, in turn, at H.'s request, conveyed it to J., the son of H., also without consideration. Subsequently P. sued H. for the excess of interest, obtained a judgment, and levied upon the land. Thereupon J. conveyed it to M., a *bona fide* purchaser, for a valuable consideration. *Held*, that the purchase-money in J.'s hands was attachable under P.'s judgment.

ATTACHMENT execution, upon funds in the hands of John Heath, under a judgment obtained in an action by John H. Page against Elijah Heath. The purchase-money, upon which the attachment

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was levied, was the proceeds of land conveyed by John Heath to Gibson A. Mundorf. The land had previously been conveyed to John Heath by his father, Elijah Heath, through O. C. Gaskill, without any consideration, and with intent to defraud the creditors of Elijah Heath. Mundorf took the land in good faith. The evidence showed that the land had been levied upon by *fi. fa.* under said judgment previous to its sale to Mundorf, but that nothing had been done further under that execution. In 1866 the present attachment execution was levied on the proceeds of the sale of the land to Mundorf, then in John Heath's hands. The facts are mainly set forth in the opinion.

S. A. Purviance and *B. F. Lucas* (with them were *A. G. Lucas* and *W. S. Purviance*), for the plaintiff in error, cited *Grant v. Potts*, 2 Miles, 164; *Tams v. Wardle*, 5 W. & S. 222; *Postens v. Postens*, 3 id. 127; *Scott v. Heilager*, 2 Harr. 238; *Magniac v. Thompson*, Bald. 344; *McKee v. Gilchrist*, 3 Watts, 232; *Ashmead v. Hean*, 1 Harr. 584; *Dean v. Connelly*, 6 Barr. 249; *Drum v. Painter*, 3 Casey, 150; *Reichart v. Castator*, 5 Bin. 105; *Tonor v. Barrington*, Brightly, 253; *Swinton v. Swinton*, 1 Dane's Ab. 628; *Adams v. Adams*, id.; *Foster v. Hall*, 12 Pick. 89; *Phillips' Academy*, 12 Mass. 456; *Bridges v. Eggleston*, 14 id. 250; *Huston v. Wickersham*, 8 Watts, 523; *Byrod's Appeal*, 7 Casey, 241; *Hinde v. Longworth*, 11 Wheat. 199; 3 Sumner, 429; *Gibson v. N. American Land Co.*, Peters' C. O. 460; *Mateer v. Hissim*, 3 Penn. 166; *Posten v. Posten*, 4 Wh. 27; *Miller v. Pearce*, 6 W. & S. 101; *Chambers v. Spencer*, 5 Watts, 404; *How v. Bishop*, 3 Metc. 26; *Portland Bank v. Hall*, 13 Mass. 207; *Blanchard v. Colburn*, 16 id. 345; *Ripley v. Severance*, 6 Pick. 474; Act of June 16th, 1836, § 35; Pamph. L. 767; Purd. 435, pl. 30; *Reed v. Porter*, 2 Grant, 472; *Riddle v. Etting*, 8 Casey, 412; *Patten v. Wilson*, 10 id. 299; *Strong v. Bass*, 11 id. 334; *Myers v. Baltzell*, 1 Wright, 493; *Fessler v. Ellis*, 4 id. 249.

H. Burgwin, for defendant in error.

AGNEW, J. The numerous assignments of error to the charge and answers of the court to points will be resolved by the disposition we shall make of a few principal questions. This was an execution attachment against John Heath, as garnishee, under the following circumstances.

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Elijah Heath had lent money to John H. Page, at usurious interest. The deed from John H. Page to Elijah Heath, for property accepted by Heath in payment of the debt, and by which the usury was consummated, bears date December 13, 1861, and was acknowledged December 31, 1861. In *Heath v. Page*, 12 Wright, 145, it was held, however, that the usury was not complete until the 14th day of April, 1862, when satisfaction was entered on the mortgage given to secure the debt. On the 2d of July, 1862, Page sued Heath for the excess of interest paid him, and recovered judgment June 27, 1864. The declaration was in *indebitatus assumpsit* and laid the time when the debt accrued for the excess of interest as of the 1st of February, 1862. Elijah Heath conveyed the property from which the money attached in the hands of John Heath arose, to Charles Gaskill, by deed dated 29th of April, 1862, reciting a consideration of \$7,000. Gaskill and wife conveyed the same property to John Heath, the garnishee, by deed dated May 26, 1862, reciting a consideration of \$8,000. It is conceded that both these deeds were purely voluntary, no money being paid by either grantee. John Heath sold and conveyed the property to Gibson A. Mundorf, a *bona fide* purchaser, without notice of any fraud, by deed dated December 26, 1864, for the sum of \$14,750 paid in full to Heath. This is the money attached in the hands of John Heath. Then, whether we take the date of Page's deed to Elijah Heath, in payment of his mortgage, the date laid in the declaration in the suit for the excess of interest, or the date of the satisfaction of the mortgage of Page to Heath, the usury was complete before the 29th of April, 1862, the date of E. Heath's deed to Gaskill, and Page's right to recover the excess had already vested. Page, therefore, was an existing creditor to be affected by Heath's deed to Gaskill, unless his claim for the excess of interest is not a debt, and he not a creditor, within the protection of the statute of 13 Elizabeth. This, then, is the first question.

For one hundred and thirty-five years the legislation of the State, on the subject of interest, viewed usury as a crime, and denounced upon it, a forfeiture of the money lent, as its punishment. That which was recoverable under the act of 1723, for usury, was a penalty, half of which went to the government, and half to any informer who should sue for it. But with the changes wrought in the commerce, and in the ideas of the people, came a change in their legislation; and in 1858 the lawful rate of interest, in all cases whe...

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no express contract should be made at a less rate, was established at *six per centum per annum*. When a greater rate is bargained for, no penalty is exacted, but the borrower or debtor is not bound to pay the excess, and may retain or deduct it from the debt, or, having paid it, may recover it back at any time within six months after the payment. Thus the excess of interest over six per cent is evidently the money of the borrower, which, when received by the creditor, he cannot retain, but holds for the use of the debtor, and for which an action of *assumpsit* lies. It has no cast of a penalty. Hence, in answer to an objection that the action should have been in debt and not in case, this court, through WOODWARD, C. J., in *Heath v. Page*, 12 Wright, 146, said that "the action is not for a statutory penalty, but is to recover back an excess of interest, voluntarily paid upon a usurious contract." Interest, in its very nature, is but an incident of a debt, and therefore partakes of its kind; and when detached from the principal becomes itself a debt. It was upon this inherent quality as a debt, this court held that coupons for interest bear interest. *Beaver County v. Armstrong*, 8 Wright, 63. The law of interest, under the act of 1858, now detaches the excess of the interest from the debt of which it was a part, and returns it to the debtor as his own; and it is therefore recoverable in *assumpsit*, as we held in *Heath v. Page*. At the instant, therefore, that Page's right of action accrued to recover the excess, he stood in the relation of a creditor to Heath for so much money had and received by the latter to his use.

But independently of this reasoning, on authority the claim falls within the letter and spirit of the statute of 13 Elizabeth. The statute makes "utterly void, frustrate, and of none effect," all conveyances and other recited instruments and acts, "as against that *person or persons*, his or their heirs, successors, executors, administrators and assigns, and every of them, whose *actions, suits, debts, accounts, damages, penalties, forfeitures*, heriots, mortuaries and reliefs, by such guileful, covinous, or fraudulent devices and practices, as is aforesaid, are, shall or might be in any way disturbed, hindered, delayed or defrauded:" Roberts' Digest, 296. It was, therefore, said in *Twyne's Case*, 1 Smith's Lead. Cas. 5, "that this act doth *not* extend *only* to *creditors*, but to all who had cause of action, suit, or *penalty, forfeiture*," etc. "And it was resolved that this word "forfeiture" should not be intended only of a forfeiture of an obligation, recognizance or such like (as it was objected that it should. in

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respect that it comes after damage and penalties), but also to every thing which shall by law be forfeit to the king or subject." This would include the penalties under the usury act of 1723. In *Shontz v. Brown*, 3 Casey, 131, WOODWARD, J., said, that the question is not to be answered by a sharp definition of the word "creditors," as the statute avoids conveyances made to defraud creditors and *others*. He remarked, also, that the statute extends to *contingent* liabilities, and thought it would protect a plaintiff in an action for *scandal*, or on a *contract of marriage*.

Now as we have seen that Page's right of action arose not later than the 14th of April, 1862, and before Heath's deed to Gaskill of the 29th of April, 1862, he stood protected by the statute of 13 Elizabeth. This relieves the case of numerous assignments of error and authorities.

We come now to the second principal question in the cause, to wit, the nature and attachable character of the money in the hands of John Heath. It is urged that the property having come to him through Charles Gaskill as *land*, and the money being the proceeds of his *own* sale to Mundorf, the fund is not a debt due to Elijah Heath, and is not attachable. In solving this question it is to be noticed, first, that the judgment of *Page v. Heath* entered on the 27th of June, 1864, was not a lien (aside from the fraud) on the land conveyed by Heath to Gaskill, in April, 1862. The land, therefore, can be followed only on the ground of fraud in the conveyance. It is to be observed, in the second place, that the land itself cannot be reached at all, it having passed into the hands of Mundorf, a *bona fide* purchaser for value, without notice of the fraud on the 26th of December, 1864. The *fi. fa.* levied in October, 1864, was not against John Heath, and therefore did not lie in the path of Mundorf in tracing the title of John Heath; for when he would arrive at the deed from Elijah Heath to Gaskill he would find it prior to the judgment of Page, and, therefore, unless he had notice of the fraud, he would be bound to look no farther than the judgment. As the case stood at the service of the attachment, John Heath held the proceeds of the sale to Mundorf, which alone can represent the title that Elijah Heath had in the premises; and if, by reason of the fraudulent conveyance, and the subsequent conversion of the land into money by a sale to a *bona fide* purchaser, the money cannot be followed, the creditors of Elijah Heath are balked by the fraud, and the statute of 13 Elizabeth rendered abortive. But this is a consequence not

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to be tolerated, while the only fund representing Elijah's interest remains in the hands of a mere volunteer who has paid no consideration; and this we rule on both principle and authority. The objection that there is no privity between Elijah and John Heath, to constitute the relation of creditor and debtor, is answered by the reasoning of Chief Justice GIBSON, in *Englebert v. Blanjot*, 2 Whart. 245. "What then," says he, "is the interest of a debtor in property fraudulently conveyed by him? As regards benefit to himself, absolutely nothing; but as regards benefit to those attempted to be defrauded, something tangible and substantial. For the benefit of these the ownership remains in him as a trustee *ex maleficio*. On no other principle could the legal title be sold, even on judicial process against him; yet it is constantly seized in execution as his and sold as his. The title remains in him so far as is necessary to protect the interest of his creditors." The same doctrine is reasserted in *Moncure v. Hanson*, 3 Harris, 391 and 395. This is the necessary effect of the statute of 13 Elizabeth, which avoids the fraudulent conveyance as to creditors only. As between the parties the title passes, but the law arrests it in favor of creditors, and treats the title as still in the grantor. In order to effectuate the statute, the same principle must reach the proceeds representing the grantor's estate, when the title has passed into the hands of an innocent grantee, from which it cannot be recalled; and for this we have authority. The same principle has been applied, in many cases, where the debtor had made an assignment for the benefit of creditors and the deed became void as to creditors generally, by reason of its not being recorded within thirty days under the act of 1818. In these cases, both foreign and execution attachments were supported against the assignee in favor of creditors. *Flanagin v. Wetherill*, 5 Whart. 280; *Stewart v. McMinn*, 5 W. & S. 100; *Wharton v. Grant*, 5 Barr. 39; *Watson v. Bagaley*, 2 Jones, 164; *Mitchell v. Stiles*, 1 Harris, 306; *Hennessy v. Western Bank*, 6 W. & S. 301; *Raiguel & Co. v. McConnell*, 1 Oasey, 362; *Driesbach v. Becker*, 10 id. 152; *Gerlach v. Coates*, 8 Wright, 43. The principal of these cases cannot be distinguished from the present.

The act of 1818 made the unrecorded deed *void* as to the creditors only, while as between the parties to it, the conveyance is good, and no contract can be implied on the part of the assignee to refund the proceeds of his sales, except for the surplus remaining after the execution of the trust. The cases cited are too numerous, and the doc-

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trine too well settled, that attachment execution will lie in behalf of the creditor, to be now overthrown on the ground that there is no actual contract to restore the proceeds of sale. The remarks of SERGEANT, J., in *Stewart v. McMinn*, *supra*, are directly in point: "Although the assignment is null and void against creditors, yet it is good as between the assignor and assignees; the assignor, therefore, not being able to demand the funds, they are not, it is contended, a debt due to him. If we are bound down to the rigid letter of the act, this position may, perhaps, be true. But we think we must look at the spirit of the act giving the attachment, and endeavor to effectuate its design and object; and these were to enable creditors to reach funds belonging to the debtor which could not be seized on a *fi. fa.*, but were in the hands of a third person, such as debts and other choses in action, goods pawned, etc., and that for the benefit of the creditors, and to give them a remedy, the funds in hand or uncollected may be considered as debts due to the assignor. Indeed, if it were not so, the creditors would not be able to reach them, and the assignment would, so far, be rendered valid as to creditors, notwithstanding the express enactment of the law to the contrary." These decisions bring us fairly up to the present question and to the cases directly in point. In *Menck v. Beidelmann*, 2 Grant, 319, the attachment execution is held to be an appropriate writ for the creditor in the case of a fraudulent sale of store goods, where the fraudulent vendee has sold part and has part in hand. "It is certainly true," said LOWRIE, J., "that the money received by him (the vendee) for the part sold is not legally a debt due by him to the fraudulent vendor; for the law will not help to enforce the fraud; but in the intention of the parties it is a debt, and the creditors may treat it as such and attach it, and so we decided last year at Philadelphia in the case of *Tams v. Tams*; and there have been previous decisions going in the same direction." As there is no difference in principle and reason between the proceeds of the sale of goods and of lands fraudulently conveyed, so there is none in authority, as the following cases prove. In *Mitchell v. Stiles*, 1 Harris, 306, the debtor conveyed his *real* estate under a deed of trust to sell it and pay the proceeds according to his written appointment, and execution attachment was levied of the proceeds of sales in the hands of the trustee. Still more to the point is *Coates v. Gerlach*, 8 Wright, 43, where the execution attachment was held to lie against the proceeds of real estate in the hands of a *bona fide* purchaser, who

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had not paid over the money, after a voluntary conveyance by a husband to his wife, and a sale by the wife to the purchaser, in whose hands the attachment was laid. These same cases also prove the secondary position that a grantee who is a mere volunteer, so long as the money remains in his hands, stands on no better footing than the grantor. He holds without consideration the money of the grantor, of which he is deemed to be a trustee *ex maleficio*, for his creditors. The beneficent and remedial provisions of the statute of 13 Elizabeth would be of little avail if a fraudulent grantee could pass the property over to a mere volunteer without notice of the fraud, and then claim on that ground that it or its proceeds were safe from the pursuit of creditors. It is only when the property comes into the hands of a purchaser who has paid a valuable consideration for it, or its proceeds are protected by a want of notice of the fraud. *Rogers v. Hall*, 4 Watts, 359; *Hood v. Fahnestock*, 8 id. 489.

(The attention of the court is here directed to rulings of the court below on the admission of evidence, and then proceeds as follows:)

The prior levy, which was necessarily abandoned by reason of John Heath's sale to a *bona fide* purchaser for value, was not in the way of the execution attachment. It is only when the execution or other final process is inconsistent with the attachment, that the latter becomes irregular. *Tams v. Wardle*, 5 W. & S. 222; *Coleman v. Mansfield*, 1 Miles, 56; *Newlin v. Scott*, 2 Casey, 102; *Kase v. Kase*, 10 id. 128; *Pontius v. Nesbit*, 4 Wright, 309.

(Other points of evidence are here alluded to, and the opinion closes as follows:)

Finding no error in the record the judgment is affirmed.

Kountz v. Kennedy.

KOUNTZ, appellant, v. KENNEDY.

(68 Penn. St. 187.)

Alteration of promissory note.

A promissory note was signed by A., indorsed by C., and delivered to B., who took it away with him and soon returned it to A., stating that it should have been drawn "with interest," whereupon these words were added by A.'s assent and in C.'s absence. In an action against C. on the indorsement the note was introduced in evidence in its original form, the words "with interest" having been erased. *Held*, that C. was liable, as the alteration was not fraudulent, and the note had been restored to its original form. **SHARWOOD, J., dissentiente.**

ACTION to charge the indorser of a promissory note. The note was as follows:

* \$750.00

PITTSBURG, May 24, 1868.

"Eighteen months after date I promise to pay to the order of W. J. Kountz \$750 without defalcation, for value received.

"JOHN P. HUNT."

Indorsed: "W. J. KOUNTZ."

The facts are stated in the opinion. The verdict was for plaintiff, and defendant appealed.

D. W. Bell (with him was *A. S. Bell*), for plaintiff in error, cited *Struthers v. Kendall*, 5 Watts, 229; *Southwark Bank v. Gross*, 11 Casey, 80; *Hill v. Cooley*, 10 Wright, 261; 2 Pars. on Notes, 545 549, 550, 571.

C. B. M. Smith, for defendant in error, cited *Worrall v. Gheen*, 3 Wright, 388; *Boyd v. Brotherson*, 10 Wend. 93; 2 Pars. on Notes, 570; *Nevins v. De Grand*, 15 Mass. 436.

THOMPSON, C. J. This was an action by the plaintiff, the payee of the note in suit, against the indorser; he gave in evidence the note and protest with proof of indorsement without objection, and rested.

The defense set up was, that the note had been altered, and to establish this the defendant called Ramsey, who had been the clerk of Hunt, the maker, to prove the alleged alteration. He testified

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that within an hour or an hour and a half after the making of the note, and after its delivery and indorsement by the defendant, as surety for the maker, the plaintiff brought it back to Hunt's place of business, and told witness, Hunt being temporarily absent, that the note was to have been drawn "with interest," and that he, the witness, had neglected to insert it, that he had seen and informed Hunt of the omission, and that he, Hunt, was agreed it should be inserted. The witness says he then added the words "with interest," and told Hunt of it when he came in, and that he assented to what had been done. The witness was then asked if the words had been "scratched out," and he answered that they were not there, but that they seemed to have been taken out by the use of some kind of chemicals.

This was the defense, nothing more or less. Certainly as between the maker and payee the note would not be affected by what had been done if it had remained on the paper. Nor is there a shade of suspicion from the evidence that the alteration was done for any fraudulent purpose. Not a doubt but that Kennedy expected to get his money from Hunt, the maker, and that Hunt expected to pay it. The indorser was hardly, at this early moment, expected to stand as the paying party by any of the parties to the note. An intention to defraud him by making the alteration is without any thing in the testimony to support it, and was not pretended in argument. The sole ground of defense was the alteration of the note.

But the note in evidence was precisely in the form it was when indorsed. It had been returned to its original shape. The restoration was not a fraud on the indorser, for it left the note as it was when the indorsement was made. Now, it seems to me, that, as the identity of the note remained, and there was nothing in it to enlarge the obligation of the indorser, and as what had been done was innocently but mistakenly done, and expunged, for aught we know, within the hour after it had been done, there is no rule of law unreasonable enough to hold it avoided by this.

I admit that if there had been evidence of a fraudulent tampering with the note, a different rule would apply. But regarding it as mistakenly done, in an attempt to make the note comply with the contract, and assented to by the original parties, one of them the principal in it, and without fraud, ought the consequences of such an act, done under such circumstances, be made to rank with fraud and perjury? It ought to be regarded as it manifestly was,

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to the indorser, immaterial. The holder of the note never claimed any change of the indorser's liability—and there is nothing in the note which does change it, or which shows a legal possibility of change. If this be so, and it is undeniable, the alteration was immaterial, and it is not for the indorser to escape liability by imputing an intention to make him liable, against the act of the holder to the contrary. Neither was the identity of the note changed. If its appearance was marred in the least, this was explained by the testimony, which showed the addition of two words, and the marks of their expurgation, which we are to presume, in accordance with the presumption of innocence, were expunged before any party was liable on the note. In *Kendall v. Struthers*, 5 Wright, 229, the material test seemed to be, whether the identity of the note remained. No such question as this can be raised here. It remained precisely the same as it originally was. There is no subject in the books which has occupied a much larger share of attention than questions of the alteration of writings, but, after all that has been said, each case must stand much more on its own facts than upon the rules announced in any given case. There are some general principles, however, that aid in arriving at results, and I think Mr. Parsons, in his work on Notes and Bills, volume 2, page 570, has some views material to be considered in this case. His acknowledged accuracy and ability give great weight to any subject of which he treats. Speaking of alterations of notes and bills, he says:

“The best view we can take of the question, which we suppose to be made difficult rather by facts and circumstances, than by any uncertainty as to principles, is this: If the alteration be made fraudulently or with an illegal intention, or if the original words cannot be restored certainly, or if any party has become interested in the note, or affected by it, or related to it since the alteration, in such a way that the restoration will do any wrong to this party—in either of these cases we should say, the party must abide by the alteration he made, and accept the consequences of making it. But, unless one of these reasons exist, we are not aware of any good and sufficient argument for refusing to permit him to restore the instrument to its original form and force.” It is most certain that none of these exist in this case, and, therefore, there is no reason why the plaintiff should be prejudiced; the defendant is not.

In 1 Greenleaf on Ev. 5, 565, it is laid down, among other things, “that any alteration which causes the instrument to speak a lan-

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guage different in legal effect from that which it originally spoke is a material alteration." I presume this ought to be regarded as applicable to the time when the instrument speaks in asserting its demand for satisfaction. If it be the same then, as before, without having been fraudulently tampered with, it can in no sense be regarded as having been altered materially.

Again, in the succeeding section, the learned author says: "An alteration is an act done upon the instrument by which its meaning and language are changed. If what is written upon, or erased from the instrument has no tendency to produce this result or to mislead any person, it is not an alteration." "The term at this day," he adds, "usually imports some fraud or improper design to change the effect of the instrument." There is no absolute rule of law, independent of all considerations of intention, which rules that any alteration, without affecting ultimate liability, renders the instrument void. That always depends on the materiality of the change, its effect, and the design with which it is made. We see no error in the instructions of the court to the effect that the plaintiff was entitled under the evidence to recover, and afterward in entering judgment on the verdict, and, therefore, the judgment is affirmed.

SHARSWOOD, J., dissented.

PITTOCK, appellant, v. O'NEILL.

(68 Penn. St. 253.)

Libel suit — instructions to the jury.

The plaintiff sued the editor and the publisher of a newspaper, for an alleged libelous article appearing in their columns. The article contained a statement, with comments, of judicial proceedings instigated by J. to obtain a divorce from his wife on the ground of her adultery with plaintiff; and at the trial the judge charged the jury that, "taking the whole article together, the petition for divorce, and the comments upon it, there can be no doubt that it is libelous and grossly so." *Held*, correct.

ACTION for libel by Daniel O'Neill against John W. Pittock, and James Mills, the editor and the publisher of the Pittsburg Sunday

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Leader. The libel consisted of a publication in that paper, which appeared April 21, 1867, and is as follows:

"THE LATEST DIVORCE SENSATION.—An application for divorce by an injured husband. A terrible story of domestic treachery and guilt.

"There was a great deal of excitement in certain circles in this city yesterday, growing out of developments made in regard to an application to the court of common pleas for a decree of divorce. It is no pleasant duty to record these frequently occurring instances of domestic infelicity; but the custom has become sanctioned by usage, and we believe in the end its results are beneficial, in so far as it holds up to public scorn and condemnation those for whom the law affords no adequate punishment, and whose crimes carry in their train household ruin and the wreck of domestic happiness. Such a case we have now to deal with, and it is one characterized by the most shameless treachery and hypocrisy. The annexed petition filed in the court of common pleas yesterday gives the names of the parties to the proceeding now pending, and the alleged cause of the divorce asked for."

Then followed the petition, by J. B. O'Neill, for divorce, alleging that the plaintiff had committed adultery with petitioner's wife.

The article continued:

"Mr. Daniel O'Neill, referred to in this petition, is a member of the common council from the second ward, and has considerable local reputation as a journalist. He is a first cousin and brother-in-law of the applicant for divorce, having married his sister some twelve years ago in Ireland. This lady died in June last, and her husband was again married last Thursday to a young lady of Allegheny, and is now absent from the city on a wedding tour. We have further details of this scandalous affair, but withhold them until the party upon whom the great weight of the public odium must fall returns to the city, and has an opportunity of being heard in his own defense."

On the trial before STERRETT, P. J., there was no dispute as to the publication of the alleged libel.

The court, among other things, charged the jury as follows:

(3.) "The writer of the article complained of appears to have taken for his text the petition of James B. O'Neill for divorce, filed in this court shortly before the date of the paper given in evidence. [Taking the whole article together, the petition for divorce and the comments upon it, there can be no doubt that it is libelous and grossly so. It is of a character tending necessarily to injure the reputation of the plaintiff and expose him to public hatred and contempt.]

(4.) "It is necessary, however, for the plaintiff to prove to your satisfaction that the libel was published by the defendants, and on this

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point considerable testimony has been given. [If the evidence satisfies you that it was published by them, the burden is then thrown upon them of disproving malice in the publication by showing justification, extenuation or excess.] " * * *

The jury found for the plaintiff for \$1,000.

Defendants appealed.

T. M. Marshall, for plaintiffs in error, cited *Graves v. Walter*, 19 Conn. 90; *Hakewell v. Ingram*, 28 Eng. Law & Eq. 413; 2 Greenl. Ev., § 411; *Parmiter v. Coupland*, 6 M. & W. 105; *Mix v. Woodward*, 12 Conn. 287; *Huff v. Bennet*, 4 Sandf. 120; *Newman v. Atto*, id. 668; *Snyder v. Andrews*, 6 Barb. 43; *People v. Croswell*, 3 Johns. Cas. 336; Townsend on Law of Libel, § 69 and note 55, §§ 282, 284, 285, 288; *Lanceg v. Bryant*, 30 Me. (17 Shep.) 466; *Powis v. Smith*, 5. B. & Ald. 850; *Abrams v. Smith*, 8 Blackf. 95; Townsend on Law of Libel, 379, and notes 1145, 1147, 1148; *Heard on Libel*, §§ 89, 90, 103, 110; *Insurance Company v. Walden*, 12 Johns. 513; *Haight v. Cornell*, 15 Conn. 74; *Howard v. Thompson*, 21 Wend. 319; *Grey v. Pentland*, 2 S. & R. 23; S. C., 4 id. 420; 2 Greenl. on Ev., § 418; *Thorn v. Blanchard*, 5 Johns. 508; *Vanderzee v. McGreggor*, 12 Wend. 545; *White v. Nicholls*, 3 How. 266; *Gilpin v. Fowler*, 26 Eng. Law & Eq. 386.

J. H. Hampton and *A. M. Brown*, for defendant in error.

SHARSWOOD, J. As the rule is well expressed by an approved elementary writer, "the quality of the alleged libel as it stands on the record, either simple or as explained by averments and innuendoes, is purely a question of law for the consideration of the court." 2 Starkie on Slander and Libel, 281. That this was the law in England, both in civil and criminal proceedings, up to 1792, was maintained so rigidly that nothing was submitted to the jury in such cases but the fact of publication and the truth of the innuendoes. *Rex v. Woodfall*, 5 Burr. 2661; *The King v. The Dean of St Asaph*, 3 T. R. 428, note; *The King v. Withers*, id. 428. In consequence of these decisions the statute of 32 Geo. III, ch. 60, commonly known as Mr. Fox's act, was passed. This statute is confined in terms to trials of indictments or informations when an issue or issues are joined between the king and the defendant or defendants on the plea of not guilty pleaded, in which case it declared and

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enacted that the jury may give a general verdict of guilty or not guilty upon the whole matter put in issue, and should not be required or directed to find the defendant guilty merely on proof of the publication, and of the sense ascribed to the same in the indictment or information. By the second section it was provided "that on every such trial the court or judge, before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his opinion and direction to the jury on the matter in issue between the king and the defendant or defendants, in like manner as in other criminal cases." It has never been pretended that this statute had any application to civil actions (*Levi v. Milne*, 4 Bingh. 195), and its obvious intention was merely to restore to juries their common-law right to give a general verdict in cases of libel, just as in other criminal cases, of which they had been unconstitutionally deprived. Hence the law was carefully made declaratory. The 7th section of the 9th article of the constitution of Pennsylvania has expressed the same constitutional doctrine and incorporated it with the declaration of rights: "In all indictments for libels the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases." There can be no doubt that both in criminal and civil cases the court may express to the jury their opinion as to whether the publication is libelous. The difference is, that in criminal cases they are not bound to do so, and if they do, their opinion is not binding on the jury, who may give a general verdict in opposition to it, and if that verdict is for the defendant, a new trial cannot be granted against his consent. As our declaration of rights succinctly expresses it, the jury have the right to determine the law and the facts in indictments for libel as in other cases. But in civil cases the court is bound to instruct the jury as to whether the publication is libelous supposing the innuendoes to be true, and if that instruction is disregarded, the verdict will be set aside as contrary to law.

In England the courts have recently disregarded, to some extent, this plain distinction between criminal and civil proceedings. It appears to be upon the ground that Mr. Fox's act, though limited in terms to indictments and informations, was declaratory of the law in all cases of libel; upon what principle of construction, however, it is not very easy to understand. It is there the approved practice for the judge in civil actions, after explaining to the jury the legal definition of a libel, to leave to them the question whether the

publication upon which the action is founded falls within that definition. Folkard's Stark. 202; *Baylis v. Lawrence*, 11 Ad. & Ell. 920; *Parmiter v. Coupland*, 6 M. & W. 105; *Campbell v. Spottiswoode*, 8 B. & S. 781; *Cox v. Lee*, 4 Exch. Law Rep. 284. These cases were followed in *Shattuck v. Allen*, 4 Gray, 540.

Yet it is clearly held that a verdict for the defendant upon that issue will be set aside and a new trial granted. *Hakewell v. Ingram*, 28 Eng. Law & Eq. 413. "Though in criminal proceedings for libel," said JERVIS, C. J., "there may be no review in civil matters, there are cases in which verdicts for the defendant are set aside upon the ground that the matter was a libel, though the jury found it was not." This must be conceded to be an anomaly; and it will be best to avoid a practice which leads to such a result. The law, indeed, may be considered as settled in this State by long practice, never questioned, but incidently confirmed in *McCorkle v. Binns*, 5 Binn. 340, and *Hays v. Brierly*, 4 Watts, 392. It was held in the case last cited that where words of a dubious import are used the plaintiff has a right to aver their meaning by *innuendo*, and the truth of such *innuendo* is for the jury. In New York, since the recent English cases, the question has been ably discussed and fully considered in *Snyder v. Andrews*, 6 Barb. 43; *Green v. Telfair*, 20 id. 11; *Hunt v. Bennett*, 19 N. Y. 173, and the law established on its old foundations.

A libel may be defined to be any malicious publication, written, printed, or painted, which, by word or signs, tends to expose a man to ridicule, contempt, hatred or degradation of character. 1 Am. Lead. Cases, 109; *McCorkle v. Binns*, 5 Binn. 340. The publication set forth in the declaration in this case, and given in evidence, was unquestionably a gross libel. Its language is clear and unambiguous, and it may be doubted whether, taken altogether, it needed any *innuendo* to point to the plaintiff. Such *innuendoes* are given, however, and we must consider their truth to have been found by the jury. Its avowed purpose was to hold up the plaintiff below to public scorn and condemnation, as guilty of a crime carrying in its train household ruin and the wreck of domestic happiness. It denounced the act imputed to him as one characterized by the most shameless treachery and hypocrisy. No words could have been used more directly calculated to excite against him public hatred, or to degrade his character. Had the publication been confined to the petition filed in the court of common pleas for a divorce, it might

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have been considered as privileged, and the plaintiff held bound to prove express malice. *Curry v. Walter*, 1 Bos. & Pul. 523; *McLoughlin v. McMakin*, Bright. Rep. 132; *Nuff v. Bennett*, 4 Sanf. 120. But the comments which accompanied it deprived it of its privilege. It has been held to be libelous to publish a highly colored account of judicial proceedings mixed with the party's own observations and conclusions. *Stiles v. Nokes*, 7 East, 493; *Lewis v. Clement*, 3 Barn. & Ald. 702. In such a case the general principle is, that if the publication, considered either by itself or in connection with extrinsic facts, be defamatory, malice is an inference of law, which the jury are bound to find according to the direction of the court. 2 Starkie on Slander and Libel, 322. "I take it to be a general rule," said ABBOTT, C. J., in *Duncan v. Thwaites*, 3 B. & C. 556, "that an act unlawful in itself and injurious to another is considered, both in law and reason, to be done *malo animo*; and this is all that is meant by a charge of malice in a declaration of this sort, which is introduced rather to exclude the supposition that the publication may have been on some innocent occasion, than for any other purpose."

These considerations dispose of the third and fourth assignments of error, and the first and second not being *secundum regulam*, must be treated as none.

Judgment affirmed.

READ, J., dissented.

 PENNSYLVANIA & OHIO CANAL Co., appellant, v. GRAHAM.

(68 Penn. St. 200.)

Liability of canal company — injuries from defective bridges.

The charter of the Pennsylvania and Ohio Canal Co. required it "to build and keep in good repair suitable and convenient bridges over the canal." One of the bridges, being defective, gave away while G. was driving over it, and he received injuries for which he brought suit. *Held*, that the company was liable even without evidence of actual or willful negligence on its part, and that the jury, in estimating damages, properly considered G.'s pain of mind and body.

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ACTION on the case commenced September 25, 1866, by Graham against the Pennsylvania and Ohio Canal Company. The plaintiff, while driving over a bridge built across the canal, was injured, both as to himself and his horses, wagons and merchandise, by the giving away of the bridge which was then out of repair.

The company, by its charter, was obliged "to build and keep in good repair suitable and convenient bridges over said canal." At the trial, two physicians, Drs. Kirker and Woodbridge, were allowed to testify, under defendants' objection, in regard to "the nature, extent and necessary consequence of plaintiff's injury, for the purpose of enabling the jury to make a just estimate of the damages to which he is entitled, if any." Defendants gave evidence to the effect that the bridge was built of good materials, by an experienced bridge-builder, and in a substantial manner. The jury found for the plaintiff for \$8,000. Defendants appealed.

B. B. McComb and *F. Hutchins*, for plaintiffs in error, cited 3 Black. Com. 219; Broom on Com. Law, 97; *Brown v. Mallet*, 5 C. B. 599; 3 Bacon's Abr. 498, 500; 3 Burns' Just. "Highways," acts June 13, 1836, § 6; 31 Pamph. L. 556, 560, April 12, 1855, § 1; Pamph. L. 220; Purd. 875, 876, 879, pl. 41, 47, 79; 1 Redf. on R. R. 538, *et seq.*; *Painter v. Pittsburg*, 10 Wright, 213; 1 Hill. on Torts, 109; *Monongahela Bridge v. Kirk*, 10 Wright, 112; *Dunlap v. Knapp*, 14 Ohio St. 64; *Oakland R. R. Co. v. Fielding*, 12 Wright, 320; Angell on Highways, § 272; *Lancaster Can. Co. v. Parnaby*, 11 A. & E. 243; *Orcutt v. Kittery Bridge*, 53 Me. 500; *Baxter v. Winooski Turnpike*, 22 Vt. 114; *Matthews v. Same*, 24 id. 480; 1 Para. on Cont. 86-92; 2 Hill. on Torts, 446-460; *Clark v. Try*, 8 Ohio St. 358.

L. Taylor (with him were *D. B. & E. T. Kortz*), for defendant in error.

SHARSWOOD, J. The first twelve assignments of error all depend upon one question, whether defendants below were responsible in damages to the plaintiff for the injury which he sustained in consequence of the admitted insufficiency of the bridge over their canal, without some evidence of actual or willful negligence on their part.

It has been argued that the defendants are not liable to the plain-

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tiff at all, because they owed him no duty. Their charter, by the terms of which they were "to build and keep in good repair suitable and convenient bridges over the canal," it is contended, was a contract with the State, who, alone, can take advantage of its violation. There was no privity, therefore, in the plaintiff. But even regarding it in that light, for whose use and benefit did the commonwealth exact this engagement from the corporation, as one of the terms and conditions upon which the franchise was granted? This particular clause was evidently for the benefit of all persons traveling upon the public highways. If A. contracts with B., to do a certain thing for the benefit of C. and does it so badly that C. is injured by his malfeasance, C. could not perhaps sue directly on the contract, but *non constat* that he could not maintain an action on the case, on the principle that it was a breach of duty to him, though springing from a contract with another. If, as the argument seems to admit, the commonwealth could sue for the use of the plaintiff, there is no reason why he may not maintain an action in his own name.

But it is not necessary to rely on this line of reasoning. The charter is indeed a contract; but it is also a law imposing upon the defendants, as a corporation, the burden of performing a certain duty to the public. If that duty to the public has not been performed, they become thereby responsible to all persons who may suffer any special injury in consequence of it. Upon the same principle which has been settled law from the year-books downward, if a party has sustained any special damage from a public nuisance beyond that which affects the public at large, whether it be direct or consequential, an action will lie against the author of the nuisance for redress. If the defendants, although under the authority of their charter, built a bridge over their canal, which was, originally, either rotten and unsafe, or became so subsequently, it was a public nuisance in the highway, and the plaintiff, having suffered a direct special injury, was entitled to recover of them the damages. *Wilkes v. Hungerford Market Co.*, 2 Bingh. (N. C.) 281; *Hughes v. Heiser*, 1 Binn. 463; *Pittsburgh v. Scott*, 1 Bar. 309; *Commissioners v. Wood*, 10 id. 93; *Baxter v. Winooski Turnpike Co.*, 22 Vt. 122.

In *Manly v. St. Helen's Canal and Railway Co.*, 2 Hurl. & Norm. 840, the defendants had, by act of parliament, the right to construct a canal and take tolls thereon; and had built the same across an ancient highway, having made a swivel bridge across the canal for the passage of the highway. A boatman having opened

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the swivel bridge to allow his boat to pass through in the night time, a person walking along the road fell into the canal and was drowned. It was held that the defendants, having a beneficial interest in the tolls, were liable to an action, the same as any owner of private property would be for a nuisance arising therefrom. "It has been urged," said POLLOCK, C. B., "that what was done by this canal company was done by them under the authority of an act of parliament, passed many years ago, and with the same responsibility as attaches to the trustees of a highway, or other persons, acting in the performance of functions intrusted to them by statute. I do not think that argument can prevail. The owners of this canal were to be looked on as a trading company, who, though the legislature permits them to do various acts described in the statute, are to be considered as persons doing them for their own private advantage, and are therefore personally responsible if mischief ensues from their not doing all they ought, or doing, in an improper manner, what they are allowed to do." In *The Cumberland Valley Railroad Co. v. Hughes*, 1 Jones, 140, in the case of a railway company, it was held to be their duty to keep the road in sufficient repair. It is a condition attendant upon a grant of the privilege to construct a public road or highway for profit, which, from its very nature, inures to the benefit of all who may have occasion to use the thoroughfare.

In *The Schuylkill Navigation Co. v. McDonough*, 9 Casey, 73, it was decided that the remedies against a canal company, provided by their act of incorporation, for injuries arising from the construction of the works, do not exclude the common-law remedies for injuries arising from an abuse of their privileges, or for the neglect of their duties, and that they are, therefore, liable for injuries sustained by a riparian owner in consequence of an overflow of water, caused by the pool of their dam being filled up by dirt, without regard to the question by whose act such filling up was occasioned. In *Pittsburg City v. Grier*, 10 Harris, 54, it was held that a city, being in possession of a public wharf within its limits, exercising exclusive supervision and control over it, and receiving tolls for its use, is bound to keep it in proper condition and is liable for special injury sustained by an individual in consequence of its neglect to keep the wharf in order. So in *Erie City v. Schwingle*, 10 Harris, 384, the doctrine was laid down expressly that a corporation, which is bound by its charter to keep the streets in repair, is liable for an injury occasioned by its neglect to do so, and it is not material whether the neglect

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was willful or otherwise. "Except," says BLACK, C. J., "in cases where the suit is against a public officer in his individual character and not against the corporation which he represents, as in *Bartlett v. Crozier*, 15 Johns. 250, it makes no difference whether the neglect is willful or otherwise." In like manner in *Yale v. The Hampden & Berkshire Turnpike Co.*, 18 Pick. 357, where a statute provided that a turnpike corporation "shall be liable to pay all damages which may happen to any person from whom toll is demandable, for any damage sustained by a traveler in consequence of a defect in the road," the supreme court of Massachusetts was of opinion, and so ruled, that by this act it was intended to provide that, whenever the traveler himself is not chargeable with negligence or rashness, but when, from an unforeseen cause, the road is actually defective and in want of repair, and an accident occurs without the default of either party, the company should be held liable. It is founded on the consideration that the toll is an adequate compensation for the risk assumed, and that, by throwing the risk upon those who have the best means of taking precautions against it, the public will have the greatest security against actual damage and loss.

From these cases it may be deduced that, where a corporation, in consideration of the franchise granted to it, is bound by its charter to keep a road or bridge in repair, it is liable for any injury to a person, arising from want of repair, whether the defect be patent or latent, unless he be in default, or unless the defect arose from inevitable accident, tempest or lightning, or the wrongful act of some third person, of which they had no notice or knowledge. It matters not that ordinary care was used in the erection or repair of it, and that such work was done under contract by competent workmen. The principle of *Painter v. The Mayor of Pittsburg*, 10 Wright, 213, has no application. That was an action for an injury sustained by the plaintiff, from the negligence of the contractors of the defendants, while engaged in the actual construction of a sewer. Had the plaintiff, in this case, fallen into the canal in consequence of the negligence of the contractors employed by the defendants, while actually employed either in the construction or repair of this bridge, the case presented would have been entirely different.

It is supposed that *Oakland Railway Co. v. Fielding*, 12 Wright, 320, is inconsistent with this view. But it is to be remarked that the injury arose, in that case, from a hole in the road made by third persons. "If, then," said the learned judge below, "the defendants

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had notice of the hole—if they knew that it rendered the street unfit and dangerous for public travel, and if they knowingly suffered it to remain in that condition without an effort to repair it, they were guilty of negligence.” It is evident, then, that the case was rested upon an entirely distinct and independent ground, which does not touch the principle established in the other cases cited. It may be safely admitted that if a third person had wantonly or maliciously cut away part of the timbers of this bridge, in consequence of which it had fallen, the defendants would not be liable unless notice or knowledge of the defect and neglect to repair it were brought home to them.

It is proper to notice the case of *Monongahela Bridge Co. v. Kirk*, 10 Wright, 112, which has been much relied on as showing that a clause in the charter of a bridge company, that the bridge should not be erected “in such a manner as to injure, stop or interrupt the navigation of the river by boats, rafts or other vessels,” is a limitation of the franchise only, and not a rule of liability to injured navigators. Although this is said in the opinion, it must be considered in its application to that particular case, and not as the statement of a general principle. The injury there arose from the erection of piers, which the company were authorized by their charter to build, and for consequential damages for an act within the authority conferred upon them, they were not responsible, as was held in *The Monongahela Navigation Co. v. Coon*, 6 Barr. 382, and many other cases. “Surely,” says READ, J., “it cannot be maintained that the proviso in the company’s charter is a declaration that they shall pay damages to any one injured. It is clear, therefore, that the defendants are not liable in this action unless the bridge be an unauthorized erection, and consequently a nuisance. That it is not has been sufficiently shown.”

On the whole, then, we are of the opinion, that the answers of the learned judge to the several points which form the subject of the first twelve specifications of error were correct.

It remains to consider the thirteenth assignment that the court erred in receiving the testimony of Drs. Kirker and Woodbridge relating to the pain and suffering of the plaintiff from the injuries received by his fall. Damages which necessarily result from the act complained of are properly termed general damages, and may be shown under the common allegation, *ad damnum*. Injuries to the person consist in the pain suffered, bodily and mental, and in the expenses

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and loss of property they occasion. In estimating damages, the jury may consider not only the direct expenses incurred by the plaintiff, but the loss of his time, the bodily suffering endured, and any incurable hurt inflicted, for these may be classed among necessary results. *Lang v. Colder*, 8 Barr, 479; *Pennsylvania Railroad Co. v. Books*, 7 P. F. Smith, 339. There was no error, therefore, in the admission of this evidence.

Judgment affirmed.

NEFF *et al.*, appellants, v. HORNER.

(68 Penn. St. 327.)

Alteration of promissory note.

A sealed promissory note, with several sureties, was executed and offered by the maker to the payee, who refused to accept it unless the words "interest to be paid semi-annually" were inserted. The maker thereupon, without the knowledge of the sureties, wrote the words in the note as required. *Held*, that the sureties were discharged from liability.

ACTION to charge the sureties on a promissory note. The note was as follows:

"\$500.

November 13, 1865.

"One year after date we, or either of us, promise to pay to Samuel Horner the just sum of \$500 in seven-thirties for value received of him, whereunto witness our hands and seals.

"Interest to be paid semi-annually.

"JACOB A. PENNINGTON,	[L. S.]
"JOHN NEFF,	[L. S.]
"JOSEPH DOUGHERTY,	[L. S.]
"THOMAS WILEY,	[L. S.]
"THOMAS CURL."	[L. S.]

The words "interest to be paid semi-annually" were not in the note when the sureties signed it; but Pennington, the principal, took it to Horner who refused to accept unless these words were inserted. Pennington then wrote the words in the note at the same time stating that he had authority to do so, which was untrue.

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The pleas filed were *non est factum, nil debet*, and payment with leave. By neglect of the prothonotary the plea of *non est factum* was omitted from the trial list prepared for the judge, and the trial proceeded as if this plea had not been filed. While the court was charging the jury, it was discovered that the plea of *non est factum* was actually in, and the court was requested to take notice of this, but refused to do so, because the trial had been conducted on different pleas. Verdict for plaintiff for \$503.37. Defendants appealed.

A. A. Purman (with him were Wyly & Buchanan), for plaintiffs in error, cited *Babb v. Clemson*, 10 S. & R. 419; *United States Bank v. Russell*, 3 Yeates, 391; *Miller v. Gilleland*, 7 Har. 120; *Marshall v. Gougler*, 10 S. & R. 164; *Henning v. Werkheiser*, 8 Barr. 518; Byles on Bills, 475; *Warrington v. Early*, 2 Ellis & B. 762; 2 Parsons on Bills, 545; Add. on Cont. 1083, 1084. The record as to the plea might have been amended. *Smith v. Hood*, 1 Cas. 220.

R. W. Downey, for defendant in error.

AGNEW, J. It seems to be settled that a voluntary alteration of a bond, note, or other instrument under seal, in a material part, to the prejudice of the obligor or maker, avoids it, unless done with the assent of the parties to be affected by it. 1 Greenl. Ev., § 565; *Marshall v. Gougler*, 10 S. & R. 164; *Barrington et al. v. Bank of Washington*, 14 id. 422, 423; *Foust v. Renno*, 8 Barr, 378; *Henning v. Werkheiser*, id. 518; *Smith v. Weld*, 2 id. 54. Such a willful act differs from spoliation by a stranger, or accidental alteration done through mistake, where the instrument remains effectual in law, as it was before alteration. 1 Greenl. Ev., §§ 566, 568.

In respect to bills, notes and other commercial paper, the rule is even more stringent, the law casting on the holder the burden of disproving any apparent material alteration on the face of the paper. *Stephens v. Graham*, 7 S. & R. 505; *Simpson v. Stackhouse*, 9 Barr, 186; *Paine v. Edsell*, 7 Har. 178; *Miller v. Reed*, 3 Casey, 244.

The only Pennsylvania case that seems to run against this strong current of authority is *Worrell v. Gheen*, 3 Wright, 388, but it is plainly exceptional. The opinion declares on the general principle strongly, but makes the case an exception on the ground that the

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plaintiff had no hand in the alteration, and because the case being stated for the opinion of the court, they were met by no discrepancy between the *allegata* and *probata*. How far the grounds of distinction may be deemed satisfactory it is of no importance, for it is sufficient that the case is made an exception expressly.

In the present instance, however, the plaintiff, who was examined on his own behalf, admitted that Pennington, the principal in the note, made the addition in his presence. He saw him do it. He would not take the note till Pennington did so. The latter said he had authority from his sureties, but this was untrue. The alteration was not accidental, and the plaintiff, though guiltless of the fraud, was foolish to accept a note he himself saw altered by the principal without being certain he had authority to bind his sureties. The alteration was material, for it added interest to the principal. It was not out of the way, so as to be no part of the note, for its position at the foot of the note, and by way of continuation, would have bound the sureties to the payment of interest, had there been authority from them to write it there. It was material in the eyes of the plaintiff, for he refused to take the note without interest added to it, and brings the suit upon it in this altered state. The note was, therefore, avoided as to the sureties, and the court erred in holding that the plaintiff could recover the principal from all the parties, disregarding his claim for the interest. It is argued that a recovery of the principal sum does no harm, for to that extent the sureties bound themselves. But the conclusive answer is that stated by Mr. Greenleaf, *supra*, section 565. The ground of the rule is public policy to insure the protection of the instrument from fraud and substitution. The writing goes into the hands of the party who claims its benefit, and the purpose is to take away the motive for alteration, by forfeiting the instrument on discovery of the fraud. When the sureties signed it they had a right to have it delivered unaltered to the plaintiff. He was bound to know that the alteration was rightfully done, and that the penalty of his negligence, or his wrongful act, was a loss of the security.

As to the plea of *non est factum*, there ought to have been no difficulty. The plea was already on the record, and it was the mere oversight of the clerk that it did not appear on the judges' trial list. Consequently, when informed of the fact, the plea should have been allowed its proper effect; and if the court thought the

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plaintiff was taken by surprise, a juror might have been withdrawn, or such order made as would prevent injustice. But, as the case was submitted, a wrong was done to the defendant, which could be repaired only by a new trial; for the effect of disregarding the plea of *non est factum* on the record was to deprive the defendant of a defense which struck at the very marrow of the plaintiff's case.

Judgment reversed, and a venire facias de novo awarded.

ZEISWEISS, appellant, v. JAMES.

63 Penn. St. 465.)

Will — void remainder — infidel society.

By a will certain property was devised to C. and J. for life, and after their death to the "Infidel Society in Philadelphia hereafter to be incorporated, and to be held and disposed of by them for the purpose of building a hall for free discussion of religion, politics," etc. *Held*, (1) that this remainder, limited to a corporation thereafter to be created, was void, because there was no devisee competent to take at the time, and the possibility that there might be such a corporation during the particular estate for life was too remote; (2) that it was not valid as a charitable use which could be enforced and administered in a court of equity. *It seems* that such a corporation could not be formed under the laws of Pennsylvania providing for the incorporation of societies for literary, charitable or religious purposes, and beneficial associations.

CASE stated. Amanda James, Anna James and Mary A. Conover, with her husband, O. H. P. Conover, plaintiffs; Nathaniel Z Zeisweiss, defendant. The facts submitted to the court involved the interpretation of a will made by Levi Nice, of Philadelphia, who died April, 1865, devising a tract of land known as Oxford Lodge. The plaintiffs, two of whom were the first takers under the will, made a contract for the sale of the land to the defendant, but he refused to complete the contract, on the ground that the plaintiffs, under the will, did not possess a good title in fee simple. The will is as follows:

"I give and devise unto my grand-nieces Mary A. Conover, wife of O. H. Perry Conover, and Anna N. James, children of my niece Amanda James, all

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the property of which I may die possessed of, in fee simple, and to their heirs and assigns, subject nevertheless to the following restrictions, that is to say, that the real estate of which I may die seised shall be held and enjoyed by them during all the time of their natural lives, or, in case of the death of one of them, during the life of the survivor upon the express condition that they shall make the homestead property upon which I now reside, and known as Oxford Lodge, as their place of permanent residence or the residence of one of them, and it is my will that should they both refuse to so reside at said homestead residence for the space of two months, then said real estate is to go as directed in the next clause of this my will, that is to say, in the same manner as if both of devisees were dead."

"Immediately after the death of both of my said grand-nieces, then it is my will that my real estate aforesaid shall go to and be held in fee simple by the Infidel Society in Philadelphia hereafter to be incorporated, and to be held and disposed of by them for the purpose of building a hall for the free discussion of religion, politics," etc.

The court entered judgment for the plaintiff upon the case stated. Defendant appealed.

W. A. Manderson, for plaintiff in error.

Thos. J. Clayton, for defendant in error, cited 2 Redf. on Wills (2d ed.), 770; 1 Dev. Eq. 276; *Holland v. Peck*, 2 Ired. Eq. 255; 1 Jarman on Wills, 332.

SHARSWOOD, J. It must be conceded that the devise by the will of Levi Nice to Mary A. Conover and Anna M. James, in fee simple, is reduced, by the subsequent words, to a life-estate to the devisees and the survivor of them, determinable, however, on their both refusing to reside on the homestead known as Oxford Lodge for the space of two months. The testator declares that in that event the said real estate is to go as directed in the next clause of his will; that is to say, in the same manner as if both of the devisees were dead.

The next clause is as follows: "Immediately after the death of both my said grand-nieces, then it is my will that my real estate aforesaid shall go to and be held in fee simple by the Infidel Society in Philadelphia, hereafter to be incorporated, and to be held and disposed of by them, for the purpose of building a hall for the free discussion of religion, politics," etc.

If there was an Infidel Society in Philadelphia at the date of the

will, it was not then incorporated, the testator expressly referring to it as thereafter to be incorporated. If we are to infer the nature and objects of the corporation from the name, it means an association of infidels or unbelievers, for the purpose of propagating infidelity, or a denial of the doctrines and obligations of revealed religion. It must be so understood, according to the commonly received meaning of the term. Such an association, it would seem, could not be incorporated under any of the general laws of the commonwealth. The acts of April 6, 1791 (3 Smith, 20), and of October 13, 1840 (Pamph. L. 1841, p. 5), provide for the incorporation of societies for any literary, charitable or religious purpose, and beneficial societies or associations. It could scarcely be considered as within either the letter or spirit of these acts. It is highly improbable that the legislature will ever incorporate, or authorize the incorporation of, such an association. Supposing it, however, to be possible, it is *potentia remota*—that a corporation should be created, and with that name—a possibility upon a possibility, which, as Lord COKE tells us, is never admitted by intendment of law. Co. Litt. 25, 26, 184 a. It is like a remainder to the heirs of a person unborn—that a person should be born and die during the continuance of the particular estate—or to an unborn son of a particular name. Fearne, 251. Indeed, the very case is put in the old books that, if a remainder be limited either by feoffment or devise to a corporation which is not in existence at the time of the grant or devise, the remainder is void, even though such a corporation should afterward be erected during the particular estate, because it is *potentia remota*. *Sir Hugh Cholmey's Case*, 2 Rep. 51 a; *Cane v. Cowper*, Moor, 104; *Cowden v. Clarke*, Hob. 33; *Noe's Case*, Winch. 55; *Simpson v. Southward*, 1 Rol. 254. In the Year Book, 9 Hen. VI, 24, it is laid down that if one devise lands to the priests of a chantry, or of a college in the church of A., at which time there is no chantry and no college, the devise is void, notwithstanding the devise is by license of the king; and if after a chantry or college is made in the same place, yet they shall not have the land, because at the time of the devise there was no corporation in which the devise could take effect. We must conclude then that this remainder, limited to a corporation thereafter to be created, was void, because there was no devise competent to take at the time, and the possibility that there might be such a corporation, during the particular estate for life, was too remote.

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But it may, nevertheless, be true that if the purpose for which the devise over in remainder was made, be a valid, charitable use, which can be enforced and administered in a court of equity, it will not be allowed to fail for want of a trustee. *McGirr v. Aaron*, 1 Penn. 49. Such an use may be vague and indefinite, so that no particular person or persons may have such an interest as will give them a right to demand the execution of it, yet that forms no objection to a charity if there be a competent trustee named, clothed with discretionary power, either express or implied, to carry out the general objects of the donor or testator. As was said by GIBSON, C. J., in *Whitman v. Lex*, 17 S. & R. 93: "It is immaterial whether the person to take be *in esse* or not, or whether the legatee was at the time of the bequest a corporation capable of taking or not, or how uncertain the objects may be, provided there be a discretionary power vested anywhere over the application of the testator's bounty to those objects." To the same effect are *McGirr v. Aaron*, 1 Penn. 51; *Martin v. McCord*, 5 Watts, 495; *Beaver v. Filson*, 8 Barr, 335; *Pickering v. Shotwell*, 10 Bar. 23; *The Domestic and Foreign Missionary Society's Appeal*, 6 Casey, 425. "A charitable gift," says COMSTOCK, C. J., in *Beekman v. Bonsor*, 23 N. Y. 308, "definite both in its subject and purpose and made to a definite trustee, who is to receive the fund and apply it in the manner specified, is to be maintained, although it would be void by the general rules of law, because the particular objects of the gift, or persons to be benefited by it, are unascertained. Such a gift is capable of being enforced by judicial sentence; and affords neither room nor justification for an exercise of the *cy pres* power. So much, then, of that which is peculiar in the English system of charitable trusts ought to be considered as settled in the jurisprudence of this State. But beyond this we cannot go, without exercising functions which are not judicial; which, in England, rest on prerogative, and are there exercised by the sign manual of the sovereign, or by the court of chancery, as the keeper of his conscience." *Godard v. Pomeroy*, 36 Barb. 546; *Le Page v. McNamara*, 5 Clark, 124; *Owens v. The Missionary Society*, 4 Kern. 380. The discretion which must, in such a case, necessarily be vested somewhere, cannot be assumed by a court, for it would not be a judicial function; nor can it, therefore, be reposed in a trustee or trustees of their selection. When there is no competent trustee named, or he dies or resigns, and no provision is made by the testator for the continuance of the trust, the charity

must fail. *Fontain v. Ravenel*, 17 How. (S. C.) 369. In that case executors were directed to make distribution of the estate among such charities as they should deem most beneficial. But they died without doing so.

"There must be some creative energy," said Mr. Justice McLEAN, "to give embodiment to an intention which was never perfected. Nothing short of the prerogative power, it would seem, can reach this case. There is not only uncertainty in the beneficiaries of this charity, but behind that is a more formidable objection. There is no expressed will of the testator. He intended to speak through the executors, or the survivor of them, but, by the acts of Providence, this has become impossible. It is, then, as though he had not spoken. Can any power now speak for him except the *parens patriæ*? Had he declared that the residue of his estate should be applied to certain charitable purposes, under the statute of 43 Elizabeth, or on principles similar to those of the statute, effect might have been given to the bequest, as a charity, in the State of Pennsylvania. The words 'as to the residue of his property' were used in reference to the discretion to be exercised by his executors. Without their action he did not intend to dispose of the residue of his property." "Power to act at discretion," says GIBSON, C. J., "need not be expressly given if it can be implied from the nature of the trust." *Pickering v. Shotwell*, 10 Barr, 28. No doubt an unincorporated society may be a trustee, invested with such a discretion, and may perpetuate itself by the succession of its members. This is the doctrine of the learned and elaborate opinion of Mr. Justice BALDWIN in *Sarah Zane's will*; *Magill v. Brown*, Brightly, 346, note, sustained and affirmed by the court in *The Domestic and Foreign Missionary Society's Appeal*, 6 Casey, 425, and *The Evangelical Association's Appeal*, 11 id. 316. Now, if the use in this case be a valid charitable use, it is certainly of a very indefinite nature, and requires to be administered according to a discretion to be confided to some person or persons. The testator named the Infidel Society in Philadelphia, which might have been well enough, if there was such a society, though unincorporated; but he made it an essential quality of the society thus selected, that it should be incorporated. That, as we have seen, was a *potentia remota*, which made the devise over in remainder, after the life estates, a void devise. There was no trustee then competent to exercise a discretion in the administration of the charity. Building a hall may be an object sufficiently

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definite; but the trust was not to end there. It is evidently a permanent, perpetual one. The hall, when built, must be kept up and maintained. Some person or persons must regulate the free discussion in religion and politics, and determine what is to be included under the comprehensive "*et cetera*." It is plain that no court would ever undertake to administer such a charity, or to exercise discretion through a trustee or trustees appointed by them. It is not a disposition of property "for any religious, charitable, literary or scientific use," within the act of April 26, 1855, § 10, Pamph. L. 331. If this course of reasoning be sound, it follows that this devise is void as a charity, and that the reversion, subject to the life estate, descended to Amanda James, the niece of the testator, and his heir at law, under the intestate act, and that a conveyance by her and the life-tenants will vest a good title in fee simple in their grantee.

In placing the decision on this ground, however, it must not be understood that I mean to concede that a devise for such a purpose as was evidently contemplated by this testator, even if a competent trustee had been named, would be sustained as a valid, charitable use in this State. These endowments originated in England, at a period when the religious sentiment was strong, and their tendency was to run into superstition. In modern times the danger is of the opposite extreme of licentiousness. It is necessary that they should be carefully guarded from either, and preserved in that happy mean between both, which will most conduce to the true interests of society. Established principles will enable the courts to accomplish this. Charity is love to God and love to our neighbor; the fulfillment of the two great commandments upon which hang all the law and the prophets. The most invaluable possessions of man are faith, hope, charity, these three; but the greatest of these is charity. Love worketh no ill to his neighbor; therefore love is the fulfilling of the law. It is the fountain and source whence flow all good works beneficial to the souls or bodies of men. It is not easy to see how these are to be promoted by the dissemination of infidelity, which robs men of faith and hope, if not of charity also. It is unnecessary here to discuss the question under what limitations the principle is to be admitted that Christianity is part of the common law of Pennsylvania. By the third section of the ninth article of the constitution it is indeed declared "that all men have a natural and indefeasible right to worship Almighty God according to the

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dictates of their own consciences; that no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall ever be given by law to any religious establishments or modes of worship?" It is in entire consistency with this sacred guarantee of the rights of conscience and religious liberty to hold that, even if Christianity is no part of the law of the land, it is the popular religion of the country, an insult to which would be indictable as directly tending to disturb the public peace. The laws and institutions of this State are built on the foundation of reverence for Christianity. To this extent, at least, it must certainly be considered as well settled that the religion revealed in the Bible is not to be openly reviled, ridiculed or blasphemed, to the annoyance of sincere believers who compose the great mass of the good people of the commonwealth. *Updegraph v. The Commonwealth*, 11 S. & R. 394; *Vidal v. Girard's Executors*, 2 How. (U. S.) 198. I can conceive of nothing so likely — so sure, indeed, to produce these consequences, as a hall desecrated in perpetuity for the free discussion of religion, politics, *et cetera*, under the direction and administration of a society of infidels. Indeed, I would go further, and adopt the sentiment and language of Mr. Justice DUNCAN in the case just referred to: "It would prove a nursery of vice, a school of preparation to qualify young men for the gallows and young women for the brothel, and there is not a sceptic of decent manners and good morals who would not consider such a debating club as a common nuisance and disgrace to the city."

Judgment affirmed.

Taylor v. Taylor.

TAYLOR, appellant, v. TAYLOR.

(63 Penn. St. 481.)

Construction of will—"lawful issue"—"estate tail."

A testator gave to his wife and daughter, or in case of the death of one of them, to the survivor, all his real estate during their lives, and in case of the death of the daughter, leaving lawful issue, his real estate was to descend to such lawful issue, their heirs and assigns forever. The will further proceeded: "In case my daughter shall die before her mother, leaving lawful issue, such issue shall enjoy and inherit their mother's right from the time of her death; but in case my daughter shall die, not leaving lawful issue, the executors shall sell, after the death of my wife, the real estate, and distribute the proceeds among my relatives hereinafter named." *Held* that the daughter did not take an "estate tail" which could be barred by conveyance in fee; but that she took an estate for life, with remainder to her children in fee, with an alternative limitation over, in the event of her dying without issue living at her death.

AMICABLE action on a contract for the sale of land, commenced November 19, 1869. James M. Taylor, plaintiff; Alfred B. Taylor, defendant.

The facts are as follows:

Obadiah Bonsall died seised of certain real estate, leaving a will, April 6, 1837, and proved July 21st. This will was as follows:

"I give and bequeath unto my beloved wife, Sarah Bonsall, and my daughter, Susanna Bonsall, or in the case of the death of one of them, to the survivor of them, all my real estate during their or her natural lives, and in case my daughter, Susanna Bonsall, shall depart this life leaving lawful issue, it is then my will that my real estate descend to such lawful issue, their heirs and assigns, forever; and further, it is my will that in case my daughter shall depart this life before her mother, leaving lawful issue, then such issue shall enjoy and inherit their mother's right from the time of her death. But, in case my daughter shall depart this life not leaving lawful issue as aforesaid, it is then my will that my executors, or the survivor of them, shall sell at public sale (but not till after the death of my wife, Sarah Bonsall) all my real estate, and make deed or deeds of conveyance to the purchaser or purchasers, their heirs and assigns forever, in fee simple, the same as I could do if living, and personally present; and the net proceeds of such sale it is my will that it be divided in the following manner, viz.: One-sixth part to the children of my wife's sister, Hannah Baker, or their lawful issue; one-sixth part to the children of my wife's

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deceased sister, Mary Skelton, or their lawful issue, and one-sixth part to the children of my wife's deceased sister, Susanna Walter, or their lawful issue.

"And the other half of my estate as aforesaid, I will to be divided between the children (or their lawful issue) of my sister, Rebecca Peterson, and Enoch Hannum, the son of my deceased sister Sarah (or his lawful issue), and Jesse Bonsall, the son of my deceased sister, Tacy Bonsall (or his lawful issue), share and share alike."

Sarah Bonsall, the widow of the testator, is dead. After her death, and on the 29th of May, 1858, Susanna Bonsall, the daughter, who never married, conveyed the devised premises to Francis C. Hooton in fee, with the intention, as she declared, of barring the estate tail, of which she was seised under the will. On the same day, Francis C. Hooton conveyed the same premises to Susanna Bonsall in fee, and on the 16th of June, 1865, Susanna Bonsall conveyed the premises to James N. Taylor in fee, who, on the 27th of October, 1869, made a contract with Alfred B. Taylor, the defendant, for the sale of the premises for \$11,000. On the 15th November, 1869, the day when the contract was to be completed, Alfred B. Taylor refused to take the deed and deliver the purchase-money, on the ground that James was not seised of the fee simple, and could not convey such title. The court held that, under the will, Susanna took an "estate tail" which was barred, according to her intention, by the conveyance to Hooton, and that the subsequent conveyances carried with them title of fee simple. Judgment for plaintiff. Defendant appealed.

W. B. Waddell, for plaintiff in error.

R. T. Cornwell and *W. Darlington*, for defendant in error, cited 1 Rep. 104; Co. Litt. 376; *Findlay v. Riddle*, 3 Binn. 159; *Carter v. McMichael*, 10 S. & R. 429; *Paxson v. Lefferts*, 3 Rawle, 59; *Hileman v. Bouslaugh*, 1 Har. 344; *George v. Morgan*, 4 id. 95; *Wild's Case*, 6 Co. 17; *Clark v. Baker*, 3 S. & R. 477; *Doe v. Applin*, 4 T. R. 82; *Hayes on Estates Tail*, 7 Law Lib. 106; *James' Claim*, 1 Dall. 47; *Evans v. Davis*, 1 Yeates, 332; *Price v. Taylor*, 4 Casey, 95; *Wynn v. Storey*, 2 Wright, 166; *Haldeman v. Haldeman*, 4 id. 29; *Criswell's Appeal*, 5 id. 288; *Angle v. Brosius*, 7 id. 187; *Covert v. Robinson*, 10 id. 274.

SHARSWOOD, J. The word "issue" in a will means, *prima facie* the same thing as "heirs of the body," and in general is to be con

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strued as a word of limitation, but this construction will give way, if there be on the face of the instrument sufficient to show that the words were intended to have a less extended meaning, and to be applied only to children, or to descendants of a particular class or at a particular time. There is less reluctance, indeed, to narrow the *prima facie* meaning of the word "issue" than of the words "heirs of the body;" because these latter words are proper technical words of limitation, while "issue" is not, when used in a deed; and accordingly, in a will it is to be construed as a word of purchase or of limitation, as will best effectuate the intention of the testator gathered from the entire instrument. This was well expressed long ago by Chief Justice WILLES: "Why does the word 'issue' in a will signify the same as 'heirs of the body?' Only because it may be supposed that the testator, who was ignorant of the law, intended it should have that construction. It does not, therefore, *ex vi termini* create an estate tail in a will as 'heirs of the body' do in a deed, but only when it appears to be the intent of the testator that the word should have that construction, or, at least, that it does not appear that the intent of the testator was otherwise." *Ginger v. White*, Willes, 348; *Quiddington v. Kerne*, 1 Ld. Raym. 393; *Doe on d. Cooper v. Collis*, 4 Term Rep. 294; *Slater v. Dangerfield*, 15 M. & W. 263; *Lessee of Findlay v. Riddle*, 3 Binn. 139; *Clark v. Baker*, 3 S. & R. 470; *Paxson v. Lefferts*, 3 Rawle, 59; *Hoge v. Hoge*, 1 S. & R. 144; *Abbott v. Jenkins*, 10 id. 296. It is a position not open to dispute, then, that if it appears, either by expression or by clear implication, that by the word "issue" the testator meant "children" or issue living at a particular period, as at the death of the first taker, and not the whole line of succession, which would be included under the term "heirs of the body," it must necessarily be construed to be a word of purchase; and the rule in Shelly's case can have no application. This does appear in the will now before us, both expressly and by clear implication.

The testator gives to his wife and daughter, or in case of the death of one of them, to the survivor, all his real estate during their natural lives, and in case his daughter "shall depart this life leaving lawful issue," then his real estate to descend to such lawful issue, their heirs and assigns forever. He immediately adds these words: "And further, it is my will, that in case my daughter shall depart this life before her mother, leaving lawful issue, then such

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issue shall enjoy and inherit their mother's right from the time of her death." No declaration could well be more express to show that by issue he meant children; for they were to inherit and enjoy "their mother's right" from the time of her death.

The devise over, which is relied on as enlarging the estate of the joint devisee to an estate in tail, follows this clause: "But in case my daughter shall depart this life not leaving lawful issue as aforesaid, it is then my will that my executors or the survivors of them shall sell," etc. "Lawful issue as aforesaid," can only mean such issue as by the clause immediately preceding were to enjoy and inherit "their mother's right"—of course, children.

This clear expression of intention is abundantly confirmed when we examine the terms of the whole disposition. The remainder to the issue is with superadded words of limitation in fee, to their heirs and assigns forever. This would certainly be insufficient if followed by a devise over after an indefinite failure of issue. But it is a very significant circumstance as bearing upon the question of intention, if we shall find that the testator contemplated that the devise over should take effect only on a failure of issue at a particular period—the death of the first devisee. Here was an estate in fee, with an alternative limitation over also in fee. This seems necessarily to be implied from the absolute direction to his executors or the survivor of them to sell and convert the estate into money in that event. It was to be done during the life-time of his executors or the survivor, and as he expressly provides, not until after the death of his wife. They were to distribute the proceeds between the children of his own and his wife's deceased sisters or their lawful issue. He certainly could not have had in his mind an indefinite failure of the issue of his daughter, which might be postponed to a very remote period. The nature of the devise over has always been looked at to ascertain whether a definite or indefinite failure of issue was intended: as where the ulterior devises confer estates for life only, or when they are only to take effect in case the devisee then be living. *Pells v. Brown*, Cro. Jac. 590; *Roe and Sheerer v. Jeffery*, Term Rep. 589. In the leading case of *Eichelberger v. Barnitz*, 9 Watts, 450, Mr. Justice SERGEANT states the same thing as an exception to the general rule that a devise over of land on death without lawful issue, or leaving no lawful issue, means an indefinite failure: "If the devise over be of a life estate, which implies necessarily that such devisee over may outlive

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the first estate." The reason is very clearly stated by Mr. SMITH: "Because it is not likely in such case, that the testator was contemplating an indefinite failure of issue, as that might, and most probably would, not happen until many years after the death of the object of the ulterior limitation." Smith on Executory Interests, 559. "The same construction," he adds, "is adopted, when, on failure of issue, the property is devised in trust for the payment of debts, because it could not be supposed that the testator would provide for the payment of debts, on an indefinite failure of issue, which might not happen for two or three hundred years. Id. 560, for which he cites *French v. Caddell*, 6 Bro. P. C. 58; and *Wellington v. Wellington*, 4 Burr. 2165; Fearne, 450, n. 6.

An estate tail may, no doubt, be subject to an executory devise over on some condition or event, to take effect in abridgment or derogation of it (1 Preston on Abstracts, 401), though such an executory devise can be destroyed by a common recovery suffered by the tenant in tail, which enlarges his estate into a fee, and excludes all subsequent limitations, whether in remainder or by the way of springing use or executory devise. 2 Preston on Estates, 460; 1 Preston on Abstracts, 401; 3 id. 130; 4 Kent's Com. 13. This destructibility deprives any limitation after an estate tail of all objection on the score of tending to create a perpetuity, however remote may be the event on which it is limited to vest. Lewis on Perpetuities, 663. A devise over after an estate tail on a definite failure of issue is not an executory devise, but a remainder; for it takes effect, not in derogation or abridgment of the preceding estate, but on its regular determination, though only in the event of the determination of the estate upon the death of the tenant. In this respect it resembles somewhat the remainder to trustees to support contingent remainders, which is limited only on the determination of the preceding life estate by forfeiture, or otherwise than by the death of the tenant. This remainder has been authoritatively settled to be vested (*Smith d. Dormer v. Parkhurst*, 18 Viner's Abr. 413; 4 Bro. P. C. 353), though the principle of that determination has been very seriously questioned. Smith on Executory Interests, 116. There is, however, not much importance in the distinction as to the limitation over after a definite failure of the issue of tenant in tail, since, call it what you will, executory devise, or vested or contingent remainder, it can be barred by a common recovery, or by a deed

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duly executed to dock the entail, under the act of assembly of January 16, 1790. 3 Smith, 388.

The fact, then, that the devise over is after a definite failure of issue, may not be sufficient to narrow the construction, where the words of limitation are "heirs of the body," or where the word "issue" is clearly used as a word of limitation, as in *University of Oxford v. Clifton*, Ambler, 385; *Doe d. Cannon v. Rucastle*, 8 C. B. 876. But when this is not the case, that it shall enlarge an express estate for life into an estate tail, seems opposed alike to reason and the decided cases.

I am aware of what is said in *Price v. Taylor*, 4 Casey, 95, but I think it must be regarded as an *obiter dictum* merely. The case did not call for it. It was a limitation worded in a very peculiar manner: for life, provided the devisee had no issue, but if she did leave issue at her death, then in fee simple to her heirs forever, and in case she had no issue at her death it was to go over. An estate tail might well have been implied from the first clause standing by itself; for if she was only to have a life estate if she had no issue, and that could not be ascertained till her death, what other estate could she have in the mean time, but an estate tail or in fee? That case, as an authority, must rest on its own circumstances—on the words of that particular will. *Criley v. Chamberlain*, 6 Casey, 161, is relied on to sustain the same point, but there the first limitation was in fee, and the case has no application. On the other hand I will cite a few of the decisions, confining myself to those which seem to be in point. *Plunket v. Holmes*, 1 Sid. 47, 1 Lev. 11, there was a devise to A. for life, and if he die without issue living at his death, remainder in fee. It was held to be an estate for life with contingent remainder over. *Doe and Barnard v. Reason*, cited, 3 Wils. 242. Devise to A. for life, on her decease to such issue of her body, who shall be then living, and in case my said niece shall die without issue of her body then living, then over, held to be an estate for life in A. *Bennet v. Lowe*, 7 Bing. 535, devise to D., L., V. and S. (females), and in case any of them die leaving a daughter or daughters, the share to go to each daughter in seniority; but if any of them, D., L., V. and S., should die without issue, in the life-time of M., C., A. and W., the shares of her or them so dying to go to F. and others in succession; all the rest and residue of the devisors' estate to go to D.: *Held*, that D., L., V. and S., and their daughters, took estates for life, and D. a remainder in fee in the whole. Mr

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SMITH has well expressed the result of the cases in England "When the limitation over is to take effect, not on an indefinite failure of issue of the prior taker, but on a failure of children only, or on a failure of issue within a given time, then the limitation over will not raise an estate tail by implication in the prior taker, but he will have a life estate with a contingent remainder over, or a life estate with a limitation over of a springing interest, or a fee with a conditional limitation over, as the case may be." Smith on Executory Interests, 301. Our own cases, with the exception of *Price v. Taylor*, utter the same voice. We have the opinion of Edward Tilghman, a great authority upon such subjects, of whom Judge DUNCAN said, that "he could untie the knots of a contingent remainder or executory devise as familiarly as he could his garter." 9 S. & R. 369. This opinion was not *arguendo* as counsel, but furnished by request as *amicus curiæ* in *Lessee of Findlay v. Riddle*, 3 Binn. 139. That was the case of a devise to John for life, if he dies leaving lawful issue, to his heirs as tenants in common and their respective heirs and assigns, and if he die without leaving lawful issue, then to his brother James. The devise over being without words of limitation, as the law then stood, was for life. Mr. TILGHMAN said: "It is fatal to the idea of an estate tail that indefinite issue of John were not contemplated by the testator—indefinite in point of time—on the contrary, issue at John's death then alive." The decision of the court was accordingly, that John had only a life estate. In *Carter v. McMichael*, 10 S. & R. 429, Chief Justice TILGHMAN said: "There are no expressions, which limit the failure of heirs male of the body of Edwards to the time of his death. If there had been the case would have been different." In *George v. Morgan*, 4 Harris, 95, BELL, J., said: "The words relied on (default of such issue), used in a will in reference to an estate in land, operate as a further limitation, unless there be something in the context to show that the testator contemplated a failure of issue at a particular period, and not an indefinite failure." And see *Wynn v. Story*, 2 Wright, 166; *Hoge v. Hoge*, 1 S. & R. 144; *Abbott v. Jenkins*, 10 id. 296; *Caskey v. Brewer*, 17 id. 441; *Langley v. Heald*, 7 W. & S. 96; *Turner v. Fowler*, 10 Watts, 325; *Covert v. Robinson*, 10 Wright, 274.

It seems to have been supposed, that even if the word "issue" was intended to be "children," still, as there were no children of the daughter living at the time of the devise, it shall be construed

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as a word of limitation, and *Wild's Case*, 6 R. 1606, is cited and relied on. But this must have arisen from an entire misapprehension of that case. Land was devised to A. for life, remainder to B. and the heirs of his body, remainder to Rowland Wild and his wife, and after their decease to their children. Rowland Wild and his wife then having issue, a son and a daughter. It was resolved, that Rowland and his wife had only an estate for life, with remainder to their children for life, and no estate tail. In the course of the argument this diversity was resolved for good law, that "if A. devise his land to B., and to his children or issue, and he has no issue at the time of the devise, that this is an estate tail; for the intent of the devisor is manifest and certain, that his children or issue shall take, and as immediate devisees they cannot take, because they are not *in rerum natura*, and by way of remainder they shall not take, for this was not his intent, for the gift is immediate; wherefore such words shall be taken as words of limitation." But in the case before us the devise was to the daughter for life, and to her issue or children after her death. As Mr. POWELL says: "Where a limitation is to a parent for life, and to his children by way of remainder, there seems to be no ground, whether there are children or not, for holding the parent to be tenant in tail." 2 Powell on Devises, n. It was accordingly so held by this court in *Cote v. Vonn Bonnhorst*, 5 Wright, 243; see *Lantz v. Trusler*, 1 id. 482; *Haldeman v. Haldeman*, 4 id. 29.

Our conclusion then is, that Susanna Bonsall, the daughter of the testator, took an estate for life, with remainder to her children in fee, with an alternative limitation over in the event of her dying without issue living at her death.

Judgment reversed, and now judgment for the defendant on the case stated.

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MAYS, appellant, v. MANUFACTURERS' NATIONAL BANK.

(64 Penn. St. 74.)

Bankruptcy—bona fide payment of debt to bankrupt—effect of.

Payment of deposits, by a bank, to a bankrupt at any time after the filing of the petition, although made in good faith and without actual notice of the proceedings in bankruptcy, will not discharge the bank from liability to the assignees for the amount so paid; but it must be proved that the deposits were the property of the bankrupt at the time of filing the petition.

ACTION of assumpsit by Mays and Hornor, assignees in bankruptcy of Born, against The Manufacturers' National Bank, of Philadelphia.

A petition was filed January 31, 1868, in the district court of the United States, in the case of Born, and he was declared a bankrupt February 26, 1868. Due publication of the adjudication was made, and the said assignees, now plaintiffs, were appointed March 28, 1868.

At the trial in February, 1869, Born's bank book was introduced in evidence, showing a balance in his favor February 6, 1868, of \$409.12, brought from an old book; also, entries up to April 1, amounting in all to \$2,612.42. Against this amount were several checks charged to Born from February 6th to April 4th, leaving a balance of \$29 in favor of Born April 4th. It was not denied that the bank paid these checks without any knowledge or notice of the proceedings in bankruptcy against Born, and in good faith. The court charged the jury "that the bank, not having knowledge or actual notice of the proceedings, in bankruptcy, of Born, is not liable to the assignees in bankruptcy for the moneys drawn out by him prior to notice," and directed a verdict for plaintiffs for \$29, whereupon plaintiffs appealed.

C. W. Hornor, for plaintiffs in error, referred to bankrupt act of March 2, 1867, §§ 14, 27, 28, 35, 39, 42, 44, "Acts of Congress," etc., 159, *et seq.*; *Ex parte Foster*, 2 Story, 158; *Carr v. Gale*, 3 Woodb. & M. 67; *Bramwell v. Eglinton*, Law Rep., 1 Q. B. 494; *Exley v. Inglis*, id.; 3 Exch. 247. *Lis pendens* is notice. *Taylor v. Carryl*, 13 Har. 261.

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A. H. Smith, for defendants in error, referred to bankrupt act, *supra*. *Dormer v. Brackett* (U. S. D. C. Vt.), 5 Law Rep. 392. *In re Patterson* (D. C. U. S. South. Dist. N. Y.), 6 Int. Rev. Rec. 157; *In re Rosenfield* (D. C. U. S. N. J.), 15 Pitts. Leg. Jour. 245; *Grant's Case*, 2 Story's C. C. 312.

SHARSWOOD, J. The counsel for the parties, with all their learning and research, have not been able to produce any decision upon the question, whether where the debtor of a bankrupt, in good faith, and without knowledge or notice of the proceedings against him, pays him a debt, he can be compelled to pay it over again to the assignee. The reason may be that the language of all bankrupt laws, previous to the act of congress of March 2, 1867, was such as to preclude the question from arising. In England, by the statute 13 Eliz., ch. 7, the property of the bankrupt vested in the commissioners from the time of an act of bankruptcy committed; and payments made by a debtor to a bankrupt, after a secret act of bankruptcy, would under the statute have been void. The injustice of this relation back was so apparent, that parliament, by the statute 1 Jac. I, ch. 14, made such payments, until notice of the act of bankruptcy, good; but still left payments, after commission issued, as they stood under the statute of Elizabeth. To the present time the law in England rests on the same basis; that all contracts, conveyances and dealings to and with a bankrupt in good faith and without notice before the filing of the petition are valid; otherwise, after the filing. Eden on Bankruptcy, 258; stat. 4 Geo. IV, ch. 16; 12 and 13 Vict., ch. 106. By the act of congress of April 4, 1800, section 13 (1 Story's Laws, 737), the commissioners were empowered to assign all the debts due to the bankrupt, which assignment should vest the property and right thereof in the assignee; "*provided*, that where a debtor shall have *bona fide* paid his debt to any bankrupt, without notice that such person was bankrupt, he or she shall not be liable to pay the same to the assignee, or assignees." This just and liberal provision was not contained in the act of congress of August 19, 1841 (5 Story's Laws, 28, 29), but it declared "that all dealings and transactions by and with any bankrupt *bona fide* made and entered into more than two months before the petition filed against him or by him, shall not be invalidated or affected by this act; *provided*, that the other party to any such dealings and transactions had no notice of

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a prior act of bankruptcy, or of the intention of the bankrupt to take the benefit of this act."

The act of congress of March 2, 1867, has no express provision on the subject. The case is necessarily left to the legal effect of the assignment provided by the act. The 14th section enacts "that as soon as said assignee is appointed and qualified, the judge, or where there is no opposing interest, the register shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books and papers relating thereto; and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title of all such property and estate, both real and personal, shall vest in said assignee." The only and natural construction of these words is, that the assignment, no matter when made, shall take effect by operation of law, as if it had been made at the commencement of the proceedings, or on the day of filing the petition. It is undoubtedly well settled that of such an assignment by operation of law the whole world is bound to take notice. *Hitchcox v. Sedgwick*, 2 Vern. 156; where it was said that there was a difference where a man had divested himself of his estate by his own act, and where it was taken out of him by act of parliament, whereunto all persons are supposed to be parties, and are concluded by it. *Callet v. De Gols*, Cas. Temp. Talb. 65. The same principle was applied by this court to the case of an insolvent debtor under the act of March 26, 1814 (6 Smith's Laws, 195), which provided that "the trustee or trustees shall be deemed vested with all the estate of such debtor at the time of his or their appointment." "This divestment of his debt," said DUNCAN, J., in *Wickersham v. Nicholson*, 14 S. & R. 118, "was by positive law, and the assignment a notorious judicial act, of which all the world was bound to take notice. It is constructive legal notice, and as binding to every intent as actual notice to the individual." It was accordingly decided in that case that a payment to the insolvent, the day after his assignment and discharge, by one who had not actual notice of it, was not valid. We are compelled to apply this same principle to the case of a payment to a bankrupt *bona fide* made and without actual notice after the commencement of the proceedings—namely, the filing of the petition, to which time, by the express provision of the act of congress, the assignment relates.

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It must be admitted that this is an unjust and cruel law ; and the effect of it may be to make bankrupts of honest and solvent men, who are only desirous of fulfilling their legal obligations. That all the world has notice of a transfer by operation of law, in proceeding in bankruptcy, is a mere fiction — not true in reality — whatever care the law may take to give public notice through newspapers. All men cannot afford to take all the newspapers, and if they did, have not time to read all the advertisements. Life is too short, and other cares too pressing for that. The attention of congress ought surely to be called to this subject, and some suitable provision made to protect those who deal honestly, in good faith, and without notice with bankrupts.

There is, however, another important question which arises on this record. The proceedings in bankruptcy against August Born, were commenced by filing the petition January 31, 1868, and he was adjudicated a bankrupt February 26, 1868. His bank account with the defendants below, which was all the evidence produced to charge them with the receipt and possession of any of his property, showed a balance from the old book under date of February 6, 1868, and all the deposits made by him were subsequent to that date. Now, if we give the fullest effect to the relation of the assignment to the commencement of the proceedings, it must be held to operate in the same manner as if it had been then made. It follows, logically, that it only transfers the property which the bankrupt then had. Of course we do not speak of fraudulent conveyances made by him previously. This is not only the literal construction of the act but accords with its spirit and policy. It is the most humane and liberal interpretation that the earnings and acquisitions of the bankrupt subsequent to the commencement of the proceedings shall be his own, subject to his eventful discharge. If he does not succeed in procuring that, they remain liable to execution or attachment by his former creditors. It is certainly good policy to hold out encouragement to continued effort and industry. Besides, if this is not the date of the transfer, what is? The adjudication or the discharge? A considerable period may elapse between the filing of the petition and either of these. If his acquisitions in the mean time are in any event to pass to his assignees, he will be likely to fold his hands in inactivity, content with the allowance made him by the law. It is true, that by the 16th section debts provable are those due at the time of the adjudication, but it is also true that

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by the 32d section the certificate of discharge is expressed to be "from all debts and claims which by said act are made provable against his estate, and which existed on the day of , on which day the petition for adjudication was filed." It would rather seem to follow that the adjudication was also meant to relate to the day of filing the petition, otherwise it is not easy to reconcile these provisions. *In re. Charles G. Patterson, a bankrupt*, in the district court of the United States for the southern district of New York, 6 Int. Rev. Rec. 157, Judge BLATCHFORD, in an able and elaborate opinion, adopts and vindicates this construction of the act of congress. "The intent and purport of this provision" (§ 14), says he, "is, that the property which was the property of the bankrupt at the time of the commencement of the proceedings in bankruptcy, and no other property, shall vest in the assignee, and shall vest in him as of the time of the commencement of such proceedings, no matter when the assignment to the assignee is actually executed. It does not mean that the property, which is the property of the bankrupt at the time the assignment is executed, and also the property which was his property at the time of the commencement of the proceedings, shall pass to the assignee." He accordingly decided that a bankrupt cannot be examined as to property acquired or business done after the date of filing the petition. And this decision was followed by Judge FIELD, in the district court of the United States for New Jersey, *In re. Isaac Rosenfield, Jr., a bankrupt*, 15 Pittsburg Leg. Jour. 245.

There was no evidence adduced in the court below to show that the balance in the bank, February 6, 1868, or the subsequent deposits, belonged to August Born, the bankrupt, on the 31st January, 1868 — the day the petition was filed. They may have been given to him by friends — or bequeathed to him by will, or acquired by his own industry, after that date. The *onus* was certainly on the plaintiffs below to show affirmatively that they were his property at the same time the assignment by relation took effect. They failed entirely to do this, and there was consequently no evidence for the jury to charge the defendants even with the balance which was found by the verdict.

Judgment affirmed.

NOTE. — See to same effect, *Stephens v. Mechanics' Savings Bank Association, ante.* — REP.

LIVEZEY, appellant, v. PHILADELPHIA.

(64 Penn. St. 103.)

Damages by flood—municipal responsibility.

A public bridge was carried away by an extraordinary freshet, and lodged in the stream in the land of L., where it was allowed to remain for some time obstructing the flow of water and greatly damaging L.'s adjacent land and trees. *Held*, that, in the absence of evidence of any insufficiency in the construction or fastenings of the bridge, L. could not recover of the town.

ACTION on the case by Livezey against the city of Philadelphia, commenced September 13, 1867. The facts are stated in the opinion.

W. S. Price, for plaintiff in error.

T. J. Barger, city solicitor, for defendant in error, cited *Lehigh Bridge Co. v. Lehigh Coal & Navigation Co.*, 4 Rawle 9; *Forster v. Juniata Bridge Co.*, 4 Har. 393.

SHARSWOOD, J. The learned judge of the district court, after having heard the plaintiff's case, being of the opinion that he had given no such evidence as in law was sufficient to maintain the action, entered a nonsuit, under the 7th section of the act of March 11, 1836. Pamph. L. 78.

The declaration contains four counts. The first two, with some unimportant variations in the mode of statement, allege, as the ground of complaint, that the defendants wrongfully and injuriously obstructed, diverted and turned the ancient, natural and accustomed flow of Wissahickon creek, and maintained, kept up and continued such obstruction and diversion by means of a part of a bridge of the said defendants, wrongfully kept lying in the said creek, opposite to the land of the plaintiff. The last two allege that the defendants so negligently and insufficiently erected and constructed, secured and fastened said bridge, that it was afterward washed away, removed and carried by the waters of the said creek, from the place where it was erected down to and into the bed and channel of the said creek, where it passes through the land of the plaintiff and upon the said land.

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As to the ground of negligence, it may be dismissed with the remark that there was no evidence whatever of any insufficiency in the construction or fastenings of the bridge. Had it been carried away by an ordinary freshet a presumption to that effect might perhaps have arisen. But it was a clearly proved and uncontradicted fact that the freshet in which the disaster occurred was a most unusual and extraordinary one—greater and more destructive than was ever known to happen before or since; that the water in the stream rose ten feet above its ordinary level. The accident took place in the night-time, and no one appears to have seen it, but the great probability seemed to be, in the opinion of the witnesses examined, that it would have stood had it not been butted against by a wooden bridge carried down by the flood from higher up the creek.

For this accident, therefore, and all damages resulting from it, direct or consequential, the defendants ought not to be held liable. *Actus Dei nemini facit injuriam*. The concurrence of negligence with the act of Providence, where the mischief is done by flood or storm, is necessary to fix the defendants with liability. "When a loss," says GIBSON, C. J., "happens exclusively from an act of Providence, it will not be pretended that it ought to be borne by him whose superstructure was made the immediate instrument of it." *Lehigh Bridge Co. v. Lehigh Coal and Navigation Co.*, 4 Rawle, 24.

The bridge, in this instance, lodged in the bed of the creek, which is not a navigable stream, and has never been declared a public highway, and the place where it lodged was the plaintiff's own soil. The injury alleged to have been suffered was from the diversion of the water caused by this obstruction, and the contention on the part of the plaintiff now is, that it was the duty of the defendants after reasonable notice, which was proved to have been given, to have removed it, and that, having failed to do so, they are responsible for the consequences. But the *ratio decidendi* in *Forster v. Juniata Bridge Co.*, 4 Har. 393, which seems not only founded on sound principles but to be a logical deduction from the *Lehigh Bridge Co. v. The Lehigh Coal and Navigation Co.*, 4 Rawle, 24, does not support this contention. It was there said that in such a case where there is no negligence in the first instance the sufferer must get rid of the instrument and the injury as he may. "The company were not bound," said GIBSON, C. J., "to follow the wreck of their bridge. They might abandon it without incurring respon

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sibility for it, and the defendant, after notice given, might have disincumbered his land of it by casting it back into the river; but he could not appropriate it to his own use. He certainly might have removed it at his own expense, but the refusal of the company to remove it did not divest their property in it or bar their entry to reclaim it. It was held in *Etter v. Edwards*, 4 Watts, 65, that a riparian owner has neither lien nor claim for preserving a raft cast on his land; and this on the authority of Doctor and Student, chapter 51, in which it is said that a man who has abandoned his property may at any time resume the ownership of it." The facts that, after notice from the plaintiff, the city made an effort to remove the obstruction, or failing in this, that they sold it to another, who made a second unsuccessful attempt, are circumstances which in no way vary the case. It is not essential to immunity that the defendants should have abandoned their property in the thing. The plaintiff always had his remedy in his own hands by removing it himself. Had he done so the defendants would have been entitled to it, though it may be that they could not have maintained replevin without a tender of the expense, or such expense might in trover have been recouped from the damages. Their act, or that of their vendee, though it may be admitted as the assertion of a claim to the property of the thing, could not create a liability for a wrong which they had never committed, and for the consequences of which they could not have originally been made to answer. The principle of our decisions upon this subject seems to be fully supported by the voice of the civil law. Dig., chapter 39, titles 2, 5, 24; 1 Domat by Strahan, § 1578; *Pandectes par Pothier*, vol. 16, p. 5. The owner of the thing cannot indeed by that law recover or retake possession without compensating the damage it has caused, which may be an equitable rule. The defendants here have not retaken possession, nor are they now seeking to recover it. The defendants have lost their bridge, and the plaintiff his ornamental trees. Both are innocent parties, and both have suffered from the same act of Providence. It seems just that each should bear the loss which has thus fallen upon them.

Judgment affirmed.

Meier v. Pennsylvania Railroad Co.

MEIER, appellant, v. PENNSYLVANIA RAILROAD CO.

(64 Penn. St. 285.)

Passenger carriers — roadworthiness of car.

When a railway car is perfect in appearance, but imperfect from some latent defect which the utmost skill and care could neither perceive nor provide against, the railway company is not responsible for injuries to a passenger arising from the breaking of an axle of the car while running at a proper speed upon a well-constructed road.

ACTION by Meiers against The Pennsylvania Railroad Company to recover for injuries sustained while traveling on their road on the morning of Feb. 8, 1867. The plaintiff was riding in a sleeping car at the time of the accident; the train was going west, running at the rate of twenty-six miles per hour up grade, when the axle of the forward truck of said car broke in two places and plaintiff's leg was injured. It appeared at the trial that the car had been provided with new wheels and new axles the year before; that the axles were made by a reliable firm and were of good quality, and that the train had been inspected twenty-two miles east of the place of the accident; that the road and the track were in good order, and that the train was proceeding at a proper speed.

The verdict was for the defendants; whereupon the plaintiff appealed, and assigned for error that the judge erred in charging, among other points, as follows:

"2. That the rule in regard to carriers of passengers is this: The utmost care and vigilance is required on the part of the carrier. This rule does not require the utmost degree of care which the human mind is capable of imagining; but it does require that the highest degree of practicable care and diligence should be adopted that is consistent with the mode of transportation adopted. Railway passenger carriers are bound to use all reasonable precautions against injury of passengers; and these precautions are to be measured by those in known use in the same business, which have been proved by experience to be efficacious. The company are bound to use the best precautions in known practical use. That is the rule: the best precautions in known practical use to secure the safety of the passengers; but not every possible preventive which the highest scientific skill might suggest."

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“3. If the track of defendants’ road and the car which ran upon it, to which this accident occurred, were built and constructed of the best known materials, and in the best known manner, combining all those appliances which men skilled in the art of road-building and car-constructing employ; and if the car and its running-gear were duly and carefully inspected from time to time, and as often and in such manner as those skilled in the art have from scientific knowledge and by experience found requisite, so that the jury are satisfied by the evidence that the accident was due to some cause against which precaution and foresight would be unavailable, then there can be no recovery in this case.”

I. Hazelhurst, for plaintiff in error. Defendants engaged to provide a safe railroad, roadworthy cars, and competent management. *Sullivan v. Railroad*, 6 Casey, 239; *Derwort v. Loomer*, 21 Conn. 246; *Railroad Co. v. Kennard*, 9 Harris, 204; *Laing v. Colder*, 8 Barr, 479; *Penna. Railroad v. Aspell*, 11 Harris, 147; *Readhead v. Railroad*, 2 Q. B. 412; *White v. Boulton*, 1 Peake’s Cas. 91; *Israel v. Clarke*, 4 Esp. 257; *Bremner v. Williams*, 1 Car. & Payne, 414; *Crofts v. Waterhouse*, 3 Bing. 321; *Christie v. Griggs*, 2 Camp. 79; *Sharp v. Grey*, 9 Bing. 331; *Alden v. Railroad*, 26 N. Y. 102; *Coggs v. Bernard*, 2 Ld. Raym. 909; *Jones v. Bright*, 5 Bing. 529; *Gray v. Cox*, 4 B. & C. 108; *Gardiner v. Gray*, 4 Camp. 144; *Okell v. Smith*, 1 Stark. 107 (86); *Bluett v. Osborne*, id. 384 (308); *Brown v. Eddington*, 2 M. & G. 279; Abbott on Shipping, 218; *Lyon v. Mells*, 5 East, 428; *Gibson v. Small*, 4 H. L. C 404; *Ingalls v. Bills*, 9 Metc. (N. Y.) 1; Sherman & Redfield on Negligence, 298.

T. Cuyler, for defendants in error. 2 Redfield on Railways, 170–190; *Aston v. Heaven*, 2 Esp. 533; *Hall v. Steamboat Co.*, 13 Conn. 826; *Boyce v. Anderson*, 2 Peters, 150; *Derwort v. Loomer*, 21 Conn. 245; *Hegeman v. The Railway*, 16 Barb. 353; *Caldwell v. Murphy*, 1 Duer, 241; *Ingalls v. Bills*, 9 Metc. 1; *Galena & Chicago Railway v. Fay*, 16 Ill. 558; *Wilkie v. Bolster*, 3 E. D. Smith, 327; *Chicago & Burl. Railroad v. Hazzard*, 26 Ill. 373; *Tuller v. Talbot*, 23 id. 857; *Bowen v. N. Y. Cent. Railroad*, 18 N. Y. 408; *Caldwell v. Murphy*, 1 Duer, 241; *Curtis v. The Rochester & Syracuse Railroad*, 18 N. Y. 534; *Hollister v. Nowlen*, 19 Wend. 236; *Camden & Amboy Railroad v. Burke*, 13 id. 620; *Hegeman v. Western Railroad*,

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16 Barb. 353; S. C., 3 Kern. 9; *Wilkie v. Butler*, 4 E. D. Smith, 327; *Holbrook v. The Railroad*, 2 Kern. 236.

AGNEW, J. It is agreed on all hands, says Judge REDFIELD, in his work on Railways, edition of 1867, p. 174, that carriers of passengers are liable only for negligence either proximate or remote, and that they are not insurers of the safety of their passengers, as they are as carriers of goods and baggage of passengers. The numerous cases cited from which this result is drawn justify this statement. *Alden v. N. Y. Central Railroad Co.*, 26 N. Y. 102, holding that a carrier is bound absolutely to provide a safe vehicle, irrespective of any question of negligence, is not in accord with the American cases generally, or the modern English decisions. It is reviewed in *Readhead v. Midland Railroad Co.*, 2 Law Rep., Q. B. 412, and therein said not to be founded in good reason. See the cases collected in Shearman & Redfield on Negl. (1869) 299, § 267.

The language of Judge GIBSON, taken from *New Jersey Railroad Co. v. Kennard*, 9 Har. 204, that a carrier of either goods or passengers is bound to provide a carriage or vehicle perfect in all its parts, in default of which he becomes responsible for any loss or injury that may be suffered, has no relation to the question now before us. The case he was considering was that of a car made without guards at the windows to prevent the arms of passengers being thrust out, to their injury, which he considered a defect in the construction of the car, making the carrier liable for negligence. The car was not perfect in its parts as he thought. The car was imperfect in construction, and therefore not adapted to the end to be attained, to wit, security. It may not be amiss to say that this opinion of the chief justice as to window guards, was not sustained by the court in banc, and has since been overruled in *Pittsburg & Connellsville Railroad Co. v. McCleary*, 6 P. F. Smith, 294. The doctrine we are now asked to sustain is, that though the car is perfect in all its parts, if imperfect from some latent and undiscoverable defect, which the utmost skill and care could neither perceive nor provide against, the railway company must still be held responsible for injury to passengers, on the ground of an absolute liability for every defect. The plaintiff in error in effect contends that the defendants were warrantors against every accident, but even in the case referred to, Judge GIBSON denied this rule. He said of the carrier, he is bound to guard him (the passenger) from every danger

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which extreme vigilance can prevent. This expresses the true measure of responsibility. He answered a point in these words: "That the company is responsible only for defects discoverable by a careful man after a careful examination and exercise of sound judgment." Thus: "This is true, but were there such an examination and exercise of judgment? The defective construction of the car must have been obvious to the dullest perception," etc. The same rule was laid down in *Laing v. Colder*, 8 Barr. 482. Judge BELLI says, it is long since settled that the common-law responsibilities of carriers of goods for hire do not as a whole extend to carriers of passengers. The latter are not insurers against all accidents. But though (he says) in legal contemplation they *do not warrant the absolute safety* of their passengers, they are bound to the exercise of the utmost degree of diligence and care. The slightest neglect against which human prudence and foresight may guard, and by which hurt or loss is occasioned, will render them liable in damages. The same doctrine will be found in substance in *Railroad Co. v. Aspell*, 11 Har. 149, and *Sullivan v. The Philadelphia & Reading Co.*, 6 Casey, 234, and in other cases. In all the Pennsylvania cases, it will be found that negligence is the ground of liability on the part of a carrier of passengers. Absolute liability requires absolute perfection in machinery in all respects which is impossible.

The utmost which human knowledge, human skill and human foresight and care can provide is all that in reason can be required. To ask more is to prohibit the running of railways, unless they possess a capital and surplus which will enable them to add a new element to their business, that of insurance. Nor can we carry the requirement beyond the use of known machinery and modes of using it. Railroads must keep pace with science and art and modern improvement, in their application to the carriage of passengers, but are not responsible for the unknown as well as the new. The rule laid down by the learned judge, in the language quoted in the second assignment of error, is a correct summary of the law. The rule of responsibility differs from the rule of evidence. *Prima facie*, where a passenger, being carried on a train, is injured without fault of his own, there is a legal presumption of negligence, casting upon the carrier the *onus* of disproving it. *Laing v. Colder*, 8 Barr. 482; *Sullivan v. Philadelphia & Reading Railroad Co.*, 6 Casey, 234; Shearman & Redfield on Negl., § 280; Redfield on Railways, § 1760,

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and notes. This is the rule when the injury is caused by a defect in the road, cars, or machinery, or by a want of diligence or care in those employed, or by any other thing which the company can and ought to control as a part of its duty, to carry the passengers safely; but this rule of evidence is not conclusive. The carrier may rebut the presumption and relieve himself from responsibility by showing that the injury arose from an accident which the utmost skill, foresight and diligence could not prevent.

We think none of the errors assigned are sustained, and the judgment is therefore affirmed.

NOTE. — See *Taylor v. Grand Trunk Railway Co.*, and note, 3 Am. Rep. 239.

WILTBANK'S APPEAL

(64 Penn. St. 256.)

Trusts — stock when income and not capital.

By a will a trust was created, the capital consisting of stock in two corporations. The corporations afterward issued new stock to be taken by the stockholders, and the trustees, under the will, sold the right to subscribe for stock in one company and bought stock with their own money in the other company, and sold it at an advance. *Held*, that the profits belonged to the income and not the capital of the trust.

BILL in equity by Wiltbank against The Pennsylvania company for insurance on lives, etc., praying that the defendants, be compelled to pay the plaintiff certain sums derived from the sale of stocks in the New York and New Haven Railroad Co., and the New Haven Gas Light Company. The facts are succinctly set forth in the opinion.

W. W. Wiltbank, for appellant. *Earp's Appeal*, 4 Casey, 373; *Hill on Trustee*, 384; *Paris v. Paris*, 10 Vesey, 185; *Clayton v. Gresham*, id. 288; *Wills v. Steere*, 13 id. 363; *Bardey v. Wainwright*, 14 id. 66; *Hooper v. Rossiter*, 13 Price, 774; *Price v. Anderson*, 15 Simons, 473; *Plamb v. Neild*, 6 Jurist (N. S.) 529; *McClaren v. Stanton*, 3 De Gex, F. & J. 202.

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W. F. Judson, for appellees, cited *Hartly v. Allen*, 4 Jurist (N. S.) 500.

AGNEW, J. Mrs. Maria Carleton, by her last will, created a trust of her estate, making the defendants trustees, and directing that they should pay to her daughter Julia the sum of \$1,400 per annum, out of the income and profits, and to her son, the plaintiff, the remainder of the income. After the death of Mrs. Carleton, two corporations in which she owned stock, constituting a part of the trust estate, resolved to increase their capital by an issue of new stock to be subscribed and paid for by the stockholders. The defendants, as trustees, sold the right to subscribe for stock in one company, and subscribed and paid with their own money for stock in the other company. They sold the stock subscribed for at a premium, and credited the trust fund with the sums made in both cases. The question is, whether the profits made by the trustees belong to the capital or to the income of the trust? The court below thought it was capital. We think this was an error.

The new stock issued by the New York and New Haven Railroad Company, and by the New Haven Gas Light Company, was not a part of the capital of the old stock, but a mere product of an advantage belonging to it, to wit, a right to subscribe for the new stock. The new stock is added capital represented by the cash which paid for it. This cash belonged to the parties who paid it, and formed no part of the trust estate. Had the companies sold the new stock in the market, instead of permitting it to be subscribed for by the stockholders, it is obvious, the new stock would have had no connection with the owners of the old stock. The premium of the sales of the new stock would have gone directly into the treasury of the corporations, and would have found its way into the pockets of the stockholders only by means of future dividends. The dividends thus declared, manifestly, would have been no part of the capital of the trust estate, but would be a profit earned by the corporation after the death of Mrs. Carleton, and paid to the trustee as income.

Had the defendants purchased at a sale and paid their own money, it is evident that they would have been entitled to any profit they might have made for themselves. The liability to account for the profit is founded on the fact that the right of subscription belonged to the trust estate. The defendants had no personal right to subscribe for the new stock, but could subscribe only *qua* trustee. In

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so far as this brought an advantage, it accrued, thereto, to the trust, and not to themselves. But this advantage is manifestly a profit, as it consists only of the excess made by the trustee's sale of the stock for a premium over and above the capital paid in by the trustee at par. This capital belonged to the trustee, the residue only, less expenses, was profit, and belonged to the trust. The sale of the *right* of subscription (instead of making an actual subscription and selling the stock), stands precisely on the same footing. The price obtained for it is the profit, and is the equivalent of the premium on the sale of the stock itself.

The new stock was neither a stock dividend nor a dividend of a surplus fund. It was not paid for out of either capital or income, but with the money of the trustee or subscriber. It in no sense represents either income or capital of the old stock. The price brought by the sale of the subscription right, and the premium of the subscribed stock, are, therefore, an incidental, and in one sense an accidental, profit, following the ownership of the old stock, as the product of an advantage belonging to it.

This case is not within the decision in *Earp's Appeal*, 4 Casey, 368, though falling clearly within its principle. There the actual earnings of Robert Earp's stock made before his death, were held to constitute a part of his capital at his decease, while the earnings made afterward were income only. The principle established in that case is, that the earnings or profits of stock made after death are income and not capital, even though in *form* of capital by the issue of new stock. Equity, seeking the substance of things, found that the new stock was but a product, and was, therefore, income. Precisely so it is here, equity discovers the subject of controversy is a mere product; a right incidental to the stock, and is, therefore, income.

The effect of the issue of the new stock upon the market value of the old, does not alter the principle of the case, however it may possibly influence the administration of the equity in ascertaining the actual profit realized from the advantage of subscription belonging to the old stock. There has been no serious diminution in the value of the old stock caused by the new issue, and, therefore, this possible question is not before us. In a case of what is termed the "*watering*" of stock merely—an increase of the nominal capital, without any addition, or only a partial addition, to the actual capital—there might be a difference possibly, though we do not assert it now

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Here the trustee has credited the trust with the profits made, and the only question is, whether it is income or capital. We are of opinion it is income, and to be distributed as such under the will of Mrs. Carleton. The decree of the court of common pleas is reversed, and a decree ordered to be entered in favor of the appellant with costs, the decree to be drawn up and submitted according to rule.

McKIBBIN, appellant, v. MARTIN.

(64 Penn. St. 333.)

Sale and delivery — rights of creditors of vendor.

Two sons, hotel-keepers, disposed of their interest in the hotel furniture and fixtures to their father. The father had been living in the hotel previous to the transfer. After the transfer, the sons remained, and one of them acted as superintendent. The dissolution of the partnership of the sons, and the transfer to the father, were published in two leading newspapers. Subsequently the furniture was levied on under a judgment obtained against the sons. *Held*, that not only the question of good faith in making the transfer, but also the question whether there was such delivery, actual or constructive, as to be notice to all third persons, and whether the possession taken by the vendee was exclusive, or concurrent with the vendors, was to be submitted to the jury.

Two feigned issues under the Sheriff's Interpleader Act, Chamber McKibben, claimant and plaintiff in both, Thomas J. Martin, defendant in one and Charles D. Kline in the other, to determine title to hotel-furniture, etc., levied on under judgment obtained by defendants against Jeremiah McKibben and William C. McKibben, sons of plaintiff, and former owners of the property. Previous to the judgment and levy, the sons had been keeping the Merchant's Hotel, Philadelphia, and had sold the furniture, fixtures and appurtenances, to their father, who had been living in the hotel. The notices of dissolution of partnership, and of the sale, appeared in the "Press" and "Age." The sons remained as before; and one of them conducted the business of superintendent. The hotel-bills were made out in the name of plaintiff, and he assumed general charge of the business of the hotel as soon as the sale was affected. At the trial

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the judge submitted to the jury the question of good faith and reserved the point: "Whether under all the evidence there was such actual, visible, notorious delivery and change of possession from the sons to the father of the furniture as would be valid in law against the creditor of the vendor."

The jury found for the plaintiff and the court entered judgment for defendant, whereupon plaintiff appealed.

A. McClure and *T. Cuyler*, for plaintiff in error, cited *Mc Vicker v. May*, 3 Barr, 224; *Long v. Knapp*, 4 P. F. Smith, 518; *Barr v. Reitz*, 3 id. 256; *Hugus v. Robinson*, 12 Harris, 1; *Benford v. Schell*, 5 P. F. Smith, 393.

T. J. Diehl and *P. Archer, Jr.* (with whom was *L. C. Cassidy*), for defendants in error, cited *Clow v. Woods*, 5 S. & R. 275; *Cadbury v. Nolen*, 5 Barr, 320; *Dunlap v. Bournonville*, 2 Casey, 72; *Young v. McClure*, 2 W. & S. 147; *Milne v. Henry*, 4 Wright, 352; *Brawn v. Keller*, 7 id. 104; *Edwards v. Harben*, 2 T. R. 587; *Babb v. Clemson*, 10 S. & R. 419; *Hoffner v. Clark*, 5 Whart. 545; *Steelwagon v. Jeffries*, 8 Wright, 407; *Dewart v. Clement*, 12 id. 413; *Barr v. Reitz*, *supra*; *Meyers v. Wood*, 1 Phila. 24; *Randall v. Parker*, 8 Sandf. 97; *Travers v. Ramsay*, 3 Cr. C. C. 354; *Reed v. Minor*, id. 32; *Hamilton v. Russell*, 1 Cranch, 310; *The Romp*, Olcott, 196; *Meeker v. Wilson*, 1 Gall. 423; *Cadogan v. Kennett*, Cowp. 432; *Billingsley v. White*, 9 P. F. Smith, 464. Responsibility cannot be avoided by an advertisement. *Williamson v. Fox*, 2 Wright, 214; *Watkinson v. Bank of Pennsylvania*, 4 Whart. 482; *the v. Clark*, 12 Casey, 114; *Lincoln v. Wright*, 11 Harris, 76.

SHARSWOOD, J. There are probably no more difficult and embarrassing questions than those which relate to the respective provinces of the court and of the jury to determine what is law and what is fact. It would require a volume to consider the subject in all its bearings, and deduce accurate and intelligible principles from the great mass of the decided cases, and a philosophical treatise on this important head is still, I think, a *desideratum* of our legal literature. There are undoubtedly some rules clearly established—these are plain lines of demarcation, but there is a border land of controversy in which the opposing principles seem to be in continual conflict, the victory sometimes inclining to one side and sometimes to the

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other. This conflict often has ended in a reasonable compromise by which the question has become what is termed a mixed question of law and fact, to be submitted to the decision of the jury under proper instructions from the court.

One of the questions upon which difficulty has often arisen is fraud in the sale or transfer of chattels under the statute of 13 Eliz. ch. 5, Roberts' Dig. 295. Such fraud may be either actual or legal. Actual fraud or fraud in fact consists in the intention to prevent creditors from recovering their just debts by an act which withdraws the property of a debtor from their reach. Fraud in law consists in acts, which though not fraudulently intended, yet as their tendency is to defraud creditors if they vest the property of the debtor in his grantee, are void for legal fraud, which is deemed tantamount to actual fraud, full evidence of fraud, and fraudulent in themselves, the policy of the law making the acts illegal. BALDWIN, J., in *Hanson v. Eustace*, 2 How. 688. Actual fraud is always a question for the jury—legal fraud, where the facts are undisputed or are ascertained, is for the court. *Dornick v. Reichenback*, 10 S. & R. 90 "As remarked by an eloquent writer," says Chief Justice GIBSON. "these statutes of Elizabeth produce the most beneficial effects by placing parties under a disability to commit fraud in requiring for the characteristics of an honest act such circumstances as none but an honest intention can assume; and they seem to have been expressed in general terms purposely to leave room for a large interpretation by the judges, who in accordance with the spirit rather than the words, have engrafted on them such artificial presumptions and legal intendments as are ordinarily subjects of judicial construction. In fact they act exclusively by presumptions, not always inflexible indeed, but sometimes amounting to legal conclusions." *Avery v. Street*, 6 Watts, 247.

In *Twyne's Case*, which came up in the Star Chamber in 44 Eliz., and is reported in 3 Rep. 80 b, Moore, 638, one of the badges of fraud was declared to be that "the donor continued in possession, and used the goods sold or given as his own; and by reason thereof he traded and trafficked with others, and defrauded and deceived them." No distinction was attempted between actual and legal fraud, and the tribunal forbade any question as to law and fact. It is unnecessary to trace the decisions in England. *Clow v. Woods*, 5 S. & R. 275, decided by this court in 1819, is the magna charta of our law upon this subject. The principles settled in that case have

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been recognized and affirmed by a bead-roll of subsequent decisions, which it would be a mere affectation of learning to cite. Without adverting to other points, it established that retention of possession was fraud in law wherever the subject of the transfer was capable of delivery, and no honest and fair reason could be assigned for the vendor not giving up and the vendee taking possession. Since then the courts have been principally occupied in determining when the evidence of change of possession was such as to present a question of law for the court or of fact for the jury.

No point as to actual fraud arises on this record. That was submitted to the jury, and decided by them in favor of the plaintiff. The whole question of legal fraud, however, was reserved and judgment entered on the reservation for the defendant. If there was evidence from which a jury would have been justified in inferring, under instructions from the court, that there had been in point of fact an actual and exclusive change of possession, it ought, as we think, to have been submitted to them.

The reserved point comprehends two questions, which, in the consideration of the case, it will be best to keep distinct. First: was there evidence from which the jury would be permitted to find such a delivery, actual or constructive, as the law requires to make the sale valid as against creditors? Second: was the possession taken by the vendee exclusive of the vendors or concurrent with them, in point of law?

1. Whenever the subject of the sale is capable of an actual delivery, such delivery must accompany and follow the sale to render it valid against creditors. The court is the tribunal to judge whether there is sufficient evidence to justify the inference of such a delivery. If there is any question upon the evidence as to the facts, or resting upon the credibility of witnesses, the determination of that must be referred, of course, to the jury. But if not, it is incumbent upon the court to decide it, either by a judgment of nonsuit or a binding direction in the charge. *Young v. McClure*, 2 W. & S. 147; *McBride v. McClelland*, 6 id. 94; *Milne v. Henry*, 4 Wright, 352; *Dewart v. Clement*, 12 id. 413. But it often happens that the subject of the sale is not reasonably capable of an actual delivery, and then a constructive delivery will be sufficient. As in the case of a vessel at sea, of goods in a warehouse, of a kiln of bricks, of a pile of squared timber in the woods, of goods in the possession of a factor or bailee, of a raft of lumber, of articles in the process of manufacture, where

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it would be not indeed impossible, but injurious and unusual to remove the property from where it happens to be at the time of the transfer. *Clow v. Woods*, 5 S. & R. 275; *Cadbury v. Nolen*, 5 Barr, 320; *Linton v. Butz*, 7 id. 89; *Haynes v. Hunsicker*, 2 Casey, 58; *Chase v. Ralston*, 6 id. 539; *Barr v. Reitz*, 3 P. F. Smith, 256; *Benford v. Schell*, 5 id. 393. In such cases it is only necessary that the vendee should assume the control of the subject so as reasonably to indicate to all concerned the fact of the change of ownership. Where nothing of the kind has taken place, it is the duty of the court to pronounce a mere symbolical delivery to be insufficient; but where there is evidence of such assumption of control, it is for the jury to say whether it was *bona fide* or merely colorable, and whether it was enough to give notice to the world. The question in such case is, did the vendee do all that he might reasonably be expected to do in the case of a real and honest sale? In *Barr v. Reitz*, 3 P. F. Smith, 256, the rule was clearly expressed in the opinion of the court by Mr. Justice AGNEW. "In considering the question what is an actual delivery, the nature of the property and circumstances attending the sale must be taken into the account. We are not, in carrying out a mere rule of policy, to confound all distinctions between that which is capable of easy delivery and that which is not. Squared timber lying in the woods, or piles of boards in a yard, are incapable of the same treatment as a piece of a cloth, or a horse. So there are many cases which allow the force of those circumstances, which take away any false color or appearance of ownership remaining in the seller." Then, after citing a number of decisions, it is added: "But without affirming these doctrines to the extent these cases might seem to warrant, it is sufficient to say they are illustrations of the principle we have stated, that the circumstances may prevent the court from pronouncing it a fraud, *per se*, and carry the case to the jury on the facts with proper instruction from the court on the law, if the jury find the delivery of possession merely formal or constructive." The distinction founded upon the principle here stated between a question of law and one of fact, may be illustrated by a familiar example. Upon the sale of a single board, or of a cartload of boards, it would not do to set up a constructive delivery by marking, and letting it remain where it was until it was convenient to remove it. The court would be bound to hold, as matter of law, that such articles were capable of actual delivery. But it would be different with a board-yard, filled with many piles of lumber. There

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the circumstances are such as to render an actual delivery and removal impracticable, or at least injurious and expensive. The vendee must assume the control, and do all that an honest man would reasonably be expected to do to advertise the public of the sale.

This seems to be just the difference between the case of *Stall-wagon v. Jeffries*, 8 Wright, 407, upon which the court below relied, and the evidence as it appears on this record. That was the sale of the furniture of a dwelling-house. Nothing is easier than to remove it to another house, or if that be not necessary, for the vendor to leave the house and the vendee to take possession with all the ordinary *indicia* of ownership. That is the ground upon which the present chief justice placed that determination. "Why," says he, "is not the transfer of household property to be actual and exclusive like that of any other personal property? It is as capable of manual occupancy and removal as almost any other kind. If the sale be actual it usually is removed; if it be only for the purpose of securing it against creditors, why shall it not stand on the same platform with other property, capable of delivery and change of possession?" But the circumstances of a large establishment like the "Merchants' Hotel" are entirely different. Here are many hundred lodging-rooms, parlors and sitting-rooms, besides the culinary department with its necessary offices, all fully furnished. To what other building can the vendee remove them, or at least without great deterioration and expense? They are valuable mainly for the purpose for which they are used and in the place where they are situated. It is enough that the vendee assume the direction and control of them, and in such an open, notorious manner as usually accompanies an honest transaction. Whether all was done that ought to have been done in this instance, and whether the change of possession was real and *bona fide* — not merely colorable and deceptive — leaving the actual possession and control in the vendors, were questions of fact which ought to have been submitted to the jury.

2. But the law undoubtedly is, that not only must possession be taken by the vendee, but that possession must be exclusive of the vendor. A concurrent possession will not do. "There cannot in such case," said Mr. Justice DUNCAN, "be a concurrent possession; it must be exclusive, or it would by the policy of the law be deemed colorable." *Clow v. Woods*, 5 S. & R. 287. And again in *Babb v.*

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Clemson, 10 id. 428: "There cannot be a concurrent possession in the assignor and assignees; it must be exclusive, or it is deemed colorable and fraudulent. To defeat the execution, there must have been a *bona fide*, substantial change of possession. It is mere mockery to put in another person to keep possession jointly with the former owner. A concurrent possession with the assignor is colorable. But what is the concurrent possession which will be deemed such as matter of law? Evidently as owner, or accompanied with the ordinary *indicia* of ownership—such as will lead any person not in the secret to infer that there has been no actual change. The vendor must appear to occupy the same relation to the property as he did before. In such a case the court must pronounce it fraudulent and colorable *per se*. We have been referred to three cases only in our books which were determined on this ground. These were all of the character I have stated. *Hoffner v. Clark*, 5 Whart. 545; *Brown v. Keller*, 7 Wright, 104; *Steelwagon v. Jeffries*, 8 id. 407. Certainly it may be considered as settled by abundant authority in this court that where there has been a sufficient actual or constructive delivery to the vendee, and he is in possession, the fact that the vendor is employed as a clerk or a servant about the establishment, in a capacity which holds out no *indicium* of ownership, does not constitute such a concurrent possession as the law condemns. In such cases it is a question for the jury whether the change of possession has been actual or *bona fide*—not pretended, deceptive and collusive. If there are facts tending to show that he had a beneficial interest in the business; that the proceeds of it went to him beyond a reasonable compensation for his services; that he had an unlimited power to draw upon the till; or that, with the knowledge of the vendee, he took money to pay his own debts—these are facts for the jury. I will refer to a few of the cases which sustain this view. Thus in *McVicker v. May*, 3 Barr. 224, a sale by a father to a son; when the son had removed to another tavern-stand the father continued to live with him, and was employed about the house as a servant. "When the son opened the new tavern," say the court, "his mother and sister kept house for him, and his father did jobs; but the son's possession and use of the goods were exclusive. But if mere cohabitation were a badge of fraud, a father's sale to his unmarried son would seldom be sustained. It certainly was not necessary for the son to turn his father out of doors." *Forsyth v. Matthews*, 2 Harris, 100, as explained by Mr. Justice LOWRIE, before

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whom the case had been tried below (2 Casey, 74), was a sale by a son to his father, and though the business continued to be conducted in the same place and with the assistance of the son, yet there being evidence of an actual transfer of the possession and control of the property, the sale was sustained. *Childs v. Simmons*, an unreported case, cited 2 Casey, 74; the transfer was by a storekeeper to his clerk, the vendor continued to aid in the store, but the sign was changed, and the sale was upheld. *Hugus v. Robinson*, 12 Harris, 9; the subject was a drug store. The vendee bought it for his son, who had been a clerk and apprentice of the vendor, and put him in possession. The vendor tended the store very much as before, and the signs were not changed. It was left, as a question of fact, to the jury, and the judgment was affirmed. In *Dunlap v. Bournonville*, 2 Casey, 72, two brothers transferred a coachmaker's establishment to a third, and the vendors remained in the capacity of foremen. It was held that it ought to have been submitted to the jury. Chief Justice THOMPSON has said that this case stands on the very outer verge of settled principles, but on its facts is still within them. 8 Wright, 412. In *Bilingsley v. White*, 9 P. F. Smith, 464, two partners sold out a store of goods to the brother of one of them. One of the vendors continued in the store as a hired hand. "If," said Mr. Justice WILLIAMS, "Bilingsley's acts and declarations as a salesman had been such as to leave it doubtful whether he was acting as owner or agent, then his presence and connection with the goods would have been such evidence of retained possession as to render the sale fraudulent. But if his acts and declarations were professedly and apparently those of a mere agent, and were so understood by the parties with whom he dealt, as all the evidence tends to show, then they constituted no such badge of fraud or evidence of retained possession as would justify the court in declaring the sale fraudulent."

I frankly confess that I have not regarded this line of decisions with favor. *Dunlap v. Bournonville* was tried before me in the district court, and I entered the judgment of nonsuit, which was there reversed. I dissented from the termination in *Bilingsley v. White*, because I was afraid that it went a step further than any of the preceding cases, in recognizing the right of the vendee to employ the vendor as his agent to conduct the business. Perhaps it does not go that far. But I have been too long on the bench — now nearly twenty-five years — not to have learned this lesson, that a judge has

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no right to adhere to his own favorite opinions, after they have been reversed or overruled. It is his duty to administer justice according to the law as it is settled — not according to his own notions of what it ought to be. *Neminem oportet esse sapientiores legibus.* No man out of his own private reason ought to be wiser than the law, which is the perfection of reason, says Lord COKE. 1 Inst. 97, b.

Judgment reversed, and venire facias de novo awarded.

**PHILADELPHIA, WILMINGTON AND BALTIMORE RAILROAD CO.,
appellant, v. WOELPPER.**

(64 Penn. St. 303.)

Mortgage of property to be acquired in futuro — railroads — construction of statute.

In pursuance of a statute authorizing a railroad company to mortgage "all or any part of their road, property, rights, liberties and franchises," the company executed and delivered a mortgage to certain persons, trustees, of "all the road, property, rights, liberties, privileges, corporate franchises, incomes, tolls and receipts, now held or hereafter to be acquired." *Held*, that the mortgage was authorized by the statute and gave a valid lien on the engines, cars, furniture of stations, etc., required for the transaction of the business of the company, whether owned at the date of the mortgage or subsequently acquired.

BILL in equity filed September 7, 1869, by Woelpper against Philadelphia, Wilmington and Baltimore Railroad Co., De Witt Clinton Lewis, sheriff of Chester county, *et al.*, praying that defendant be restrained from selling certain railroad property levied on under an execution issued on a judgment. This judgment was recovered July 16, 1869, by the Philadelphia, Wilmington and Baltimore Railroad Company against the Philadelphia and Baltimore Central railroad in a suit on bonds secured by a mortgage given by the Philadelphia and Baltimore Central railroad to trustees, pursuant to a statute. The sheriff, under this judgment, levied on "four locomotive engines, a number of cars, shop and quarry tools, cross-ties, iron rails, furniture at stations," etc. The inventory of the sheriff was made part of the bill as schedule B. The plaintiff

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claimed that this property was exempt from sale under execution because it was covered by the said mortgage. The remaining material facts and the conditions of the mortgage are set forth in the opinion of the court. Decree in favor of plaintiff; defendant appealed.

J. J. Pinkerton and J. S. Futhey, for appellants.

One cannot mortgage property to which he has no title. *Jones v. Richardson*, 10 Metc. 481; *Moody v. Wright*, 13 id. 17; 2 Hill on Mort. 196. A corporation can mortgage only under express authority. *Howe v. Freeman*, 14 Gray, 566; *Loudenslager v. Benson*, 8 Grant, 384. "Property" in this mortgage is too indefinite to cover engines, rolling stock, etc. *Mogg v. Baker*, 3 M. & W. 195; *Winslow v. Merchants' Ins. Co.*, 4 Metc. 306. These articles are not covered by "franchises." *Shamokin Valley Railroad v. Livermore*, 11 Wright, 465.

W. Mac Veagh, for appellees, cited Peirce on Am. Railroad Law 530, 531; *Morris v. Noyes*, 3 Am. Law Reg. (N. S.) 18; *Coe v. Hart*, 6 Am. Law Reg. 27; *Philips v. Winslow*, 18 B. Monr. 521; 1 Redf. on Railw. 235, note 21-24.

SHARSWOOD, J. By the act of assembly of February 12, 1856 (Pamph. L. 42), it was provided "that for the purpose of constructing and equipping the Philadelphia and Baltimore Central Railroad, chartered by the legislatures of Pennsylvania and Maryland, the said company is hereby authorized to borrow money to any amount not exceeding \$1,500,000," * * * "and to issue their bonds therefor," * * * "and to secure the payment of the said bonds and their interest by executing and delivering to such trustee or trustees as they may select, a mortgage or mortgages of all or any part of their road, property, rights, liberties and franchises of the said company in the State of Pennsylvania."

In pursuance of this power the said company, on February 15, 1859, did execute and deliver to Ezra Bowen and George S. Fox, trustees, a mortgage of "all the road, property, rights, liberties, privileges, corporate franchise, incomes, tolls and receipts, now held or hereafter to be acquired in the State of Pennsylvania."

The first question which arises is, whether this mortgage is effectual to give a valid lien on the locomotive engines, passenger and

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other cars, furniture of stations, tools and materials for support and repair of the road, levied on by the sheriff of Chester county under a *fieri facias* issued upon a judgment obtained by the appellants in the court of common pleas. These articles, or by far the greater part of them, were not in existence or acquired by the mortgagors at the date of the mortgage; but it is clear, and is reported as a fact by the master in the court below, that they were in actual use upon the railroad, and were required for the transaction of its business, and that the trains could not be run without them, and that, although acquired since the execution of the mortgage, they are of the kind of articles which the company had at the time, and are essential to the full exercise of the franchises granted to the company, which were for the benefit of the public as well as for that of the corporators. It is not denied that the words of grant in the mortgage are sufficiently ample to cover all this property. But it is objected that no person, natural or artificial, can grant what he does not possess or own at the time of the grant. *Qui non habet, ille non dat*. Yet even at law this rule is not without some qualifications. A man may grant the future accretions or increase of any subject which he owns at the time of the grant, as all the wool which shall grow on his sheep for a term of years. *Grantham v Hawley*, Hobart, 132, was the case of a covenant by a lessor that a lessee of a term certain might take the corn that should be growing at the end of the term, and upon an issue whether it did of right belong to the lessee it was held to be a good grant. And though the lessor had it not actually in him, nor certain, yet he had it potentially; for the land is the mother and root of all fruits. Therefore he that hath it may grant all fruits that may arise upon it after, and the property shall pass as soon as the fruits are extant. Ass. 21 Henry 6. A person may grant all the tithe wool that he shall have in such a year. 1 Plowd. 13 a. So, if a man grant *vesturam terræ*, the grantee shall have the corn, grass, underwood, sweepage and the like. 1 Inst. 4 b. It is indubitable that a mortgage of land will pass all structures or fixtures that may afterward be erected upon it by the mortgagor. But it is not necessary to maintain that the rolling stock and equipments of a railway are part of its accretions and fixtures, so as to make the transfer good at law. It is unquestionably good in equity. Contingent estates and interests, though not assignable at law, are assignable in equity; and they may also be the subject of a contract, which, when made

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for valuable consideration, will be specifically enforced when the events happen. 2 Story's Esq. 1040, 6. On the same principle equity originally took cognizance of assignments of choses in action, which were void at law, and when made for value, carried them into execution by considering the assignment a declaration of trust by the assignor in favor of the assignee, compelling the assignor to allow his name to be used by the assignee in proceeding at law, and enjoining him from releasing or otherwise interfering with the equitable property vested by the assignment in the assignee. 2 Story, 1039, 1040. It is a plain corollary from these principles that a court of equity will treat a mortgage of property, to be subsequently acquired, whether it be real or personal, as a binding contract, which attaches to the thing when acquired. Equity considers that as actually done which a chancellor would decree to be done. If then, upon every acquisition of property within the description contained in the mortgage, a chancellor would decree the mortgagor to execute a mortgage of such subject, it will be considered as though it had been done, and that of every article of property as acquired there was an actual mortgage then executed. The authorities cited in the able report of the master below fully sustain this view, to which may be added *Covey v. Pittsburg, Fort Wayne and Chicago Railroad Co.*, 3 Phila. 173, decided by our brother AGNEW, when presiding judge of the court of common pleas of the 17th judicial district.

But the principal contention here has been that the mortgage by this corporation, so far as it included subsequent acquisitions, was *ultra vires*—beyond the power conferred upon them by the legislative grant. The act authorized them to mortgage all their property, a word of very large extent. Property (*proprietas*) is whatever is a man's own (*proprius*). His future acquisitions, though subject to a contingency, are his own, and if, as we have seen, they can be granted or assigned, they are his present property, valuable now to him because they can be enjoyed or used by anticipation. There is no refinement in this reasoning as applied to the construction of this statute. The legislature evidently intended it. Every law is to be interpreted according to its subject-matter. This act relates to a railroad and its usual necessary appurtenances. The words are, "road, property, rights, liberties and franchises," including the road and all its adjuncts. The very objects of the loan, and of the mortgage to secure it, as expressed in the act, was "for the purpose

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of constructing and equipping the road." It evidently contemplated a condition of things in the future. The bare road, only then constructed in part, without any rolling stock or equipments, would have been no security, or a very inadequate one. Had the road even been fully equipped at the date of the mortgage, can it be doubted that the legislature meant that it should comprise every thing subsequently acquired to replace old and worn-out materials, and to maintain and keep up the equipment? No money would have been loaned on a security daily deteriorating, and which must eventually perish entirely. As was well said by our brother AGNEW, in the case before referred to: "To build a railroad requires a vast capital beyond ordinary means, and to borrow it, to carry into effect the objects of the incorporation, demands all the security within the possible power of the corporation to give. By necessity and practice, the money of the creditor capitalist finishes and equips the road; and slender indeed would his security be which extends not beyond worn-out rails, and rolling stock, and equipments first in use, and these, indeed, not often in being at the time of the execution of the mortgage. In giving the power to borrow and pledge, it must be supposed the power was given to its fullest extent, in order to carry into effect the object of the incorporation." This construction does not conflict with *Roberts' and Payne's Appeal*, 10 P. F. Smith, 400. That was under the act of January 11, 1867 (Pamph. L. 1372), which enabled "all iron and other manufacturing and mining corporations to borrow moneys, and to secure the loans to be made to them, by mortgage of their property." No special purpose is specified and the subject-matter was not such as to call for or require any other than a strict construction. It was held, therefore, not to include chattel mortgages. "It is true," says the opinion, "railroad corporations have been allowed to do this, and other corporations in similar circumstances, when personal interests have been of such a permanent or fixed character, or so incapable of removal that no inconvenience would be felt in relaxing the general rule as to movables. But in this act the term "property" is so wholly unexplained by its context, that it may or may not refer to chattels, and leaves the mind to hesitate and doubt whether the legislature meant more than the property accustomed to be mortgaged under the laws of the State, and for which provision was made for notice by recording, and remedy by *seire facias*."

These conclusions sustain the decree made in the court below,

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and dispense with the necessity of considering the other point made as the right of the sheriff to levy upon the articles contained in the inventory independently of the mortgage.

Decree affirmed, and appeal dismissed at the costs of the appellants

Moss, appellant, v. CULVER.

(64 Penn. St. 414.)

Exchange of lands by parol contract.

A mutual transfer of possession of lands, under a parol contract, which continues exclusive and undisturbed for 19 years, is a valid transfer of titles and is not within the statute of frauds.

ACTION of ejectment for 50 acres of land by Benjamin Moss against Wesley Culver. The plaintiff died *pendente lite*, and David Moss *et al.*, heirs and devisees, were substituted. The facts are stated in the opinion. There was a large amount of evidence reported for the consideration of the court, also assignments of error and the charge of the court below, which are referred to in the opinion, but which are unimportant to an understanding of the case. The question before the court was the validity of a parol exchange of lands made by the parties litigant. The verdict was for defendant, the appeal was by plaintiff.

D. L. Rhone, C. E. Wright and D. C. Harrington, for plaintiffs in error; *Frye v. Shefler*, 7 Barr, 93; *Greenlee v. Greenlee*, 10 Harris, 226; *Eckert v. Eckert*, 3 Penn. 332; *Poorman v. Kilgore*, 2 Casey, 371; *Workman v. Guthrie*, 5 id. 495; *Hill v. Myers*, 7 Wright, 174; *Big Mountain Improvements Co.'s Appeal*, 4 P. F. Smith, 370; *Stafford v. Henry*, 1 id. 517; *Startwell v. Wilcox*, 8 Harr. 117; *Kidder v. Boom Co.*, 12 id. 293.

AGNEW, J. The first and second assignments of error do not conform to the rule requiring the points to be set out *in totidem verbis*. The third and fourth embrace all the material questions in the cause. The contract for the exchange of farms between Benjamin

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Moss and Wesley Culver was sufficiently proved. The testimony of Joel R. Culver brought the parties face to face, not only in the fact that he was the authorized channel of communication between them, but by actual presence also. The agreement to exchange was direct, positive, express and ambiguous; its terms clearly defined, and the subjects of it identified. Wesley Culver was the equitable owner of a tract of 140 acres of land, bought of Benjamin Moss, on which he had paid all the purchase-money except a small sum. Benjamin Moss was the owner of a tract of 50 acres of land. Wesley Culver married a daughter of Moss, and went into the house on the 50 acres. For family reasons Moss desired to get back the 140 acres he had sold to Culver, and had been endeavoring to exchange the 50 acres for the 140 acres, but failed. He then sent Joel R. Culver to see his brother Wesley and persuade him to exchange. Before Joel started he asked Moss how he wanted to trade, and what proposition he should make to Wesley. Moss said, I want you to go down and offer him that lot where he lives, even up, for the 140 acres, and tell him I will make him a general warranty deed for it in lieu of that I was to make for the 140 acres. Upon these terms, the exchange was finally made, with the additional provision that Wesley should give Moss a sleigh in satisfaction of the balance of purchase-money unpaid on the 140 acres. Thus the terms of the exchange were clear and unambiguous. The subjects of it were equally well defined, the tracts being separate, well-known parcels of land, given each for the other, without the necessity of a survey, or other act to ascertain or identify them. The exchange was carried fully into execution, even to the tender of the warranty deed to Wesley Culver, but which he foolishly rejected on the ground that the terms 50 acres, *strict* measure, would not embrace (as he supposed) two or three acres additional contained in the tract. Benjamin Moss got back the tract of 140 acres, and has since held it and conveyed parts of it away. Wesley Culver has remained in the exclusive and undisturbed possession of the 50 acres for almost twenty years. The tract has been assessed to him, and taxes paid by him, during all this time. The contract, as proved by Joel R. Culver, was strongly corroborated, and mutual performance fully proved by other witnesses. Under these circumstances the contract and the facts of the exchange were properly submitted by the court to the jury, and if believed were sufficient to take the case out of the statute of frauds and perjuries. There was not such a conflict of evidence raised by the testimony of Lucy

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Wilkinson, the daughter, and Daniel Moss, the son of Benjamin Moss, as justified a withdrawal of the case from the jury. Their statement as to a different arrangement about the 140 acres, and the permissive occupancy by Wesley of the 50 acres, was strongly contradicted by the act of Moss himself in making the deed to Wesley for the 50 acres. The church trial and the deed strongly repelled any idea of a tenancy. Nor are we convinced that there was not sufficient evidence of the change of the character of Wesley's possession of the 50 acres at or immediately after the exchange. Indeed there was no satisfactory evidence of his tenancy of the tract or of the terms under which he held possession of it before the exchange. Joel R. Culver testifies that after Wesley's marriage to Moss's daughter, he went into possession of the *house* on the 50 acres—that Moss told him to move into the *house*. On the other side there was no proof of a specific tenancy. Daniel Moss said he knew that Wesley went on the place—that they all worked together there that summer. Jonah De Long said all he knew was, that Daniel Moss, Wesley and his uncle (Benjamin Moss) worked together, and he thought they divided in some way or other. Certainly this is loose evidence of a tenancy of the entire tract by Wesley, and scarcely justifies the complaint, that the judge submitted a theory of his own without evidence, as to the tenancy being confined, possibly to the house. Nor is there any force in the expressions, "the lot of land where he lives," "the land he now lives on." They were simply descriptive of the tract exchanged, and not of the character or extent of Wesley's possession of it. But assuming that previous to the exchange Wesley had a permissive possession of the entire tract of the 50 acres, so as to constitute a tenancy at will, still the evidence of a change in the character of the possession was ample, it was exclusive on the part of Wesley for about twenty years, during which time the tract was assessed, and taxes paid by him. He paid no rent and none was demanded, and although the tract lay within a short distance of Moss's residence, the possession of Wesley was undisturbed. On the other hand there is no doubt of the exclusive possession and control by Moss of the 140 acres, and his conveyance of part of it.

It is true, as has been often said, there is no difference between a parol sale and an exchange in regard to the requisites to take it out of the statute of frauds and perjuries. A clear, explicit and unambiguous contract, and a taking of possession under and in pursuance

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of the contract, are as much requisites of a parol exchange as of a sale. But there is a marked difference in the evidence which establishes the possession. A sale is confined to a subject coming from a single side. It has no relation to, or dependence on any other subject. The evidence of possession taken of it is therefore confined to the single subject, and if not taken in a reasonable time, or so as to make it doubtful whether it is attributable to the contract, the parol sale is not taken out of the statute. But an exchange necessarily has a subject on each side which stands related to the other. One is the representative of the other, so much so, that the law implies a contract of warranty by the act of exchanging. If, therefore, the evidence shows a clear, unequivocal, and complete taking possession of one of the subjects of an exchange, by the party owning the other subject, it strengthens the evidence of a possession taken by the opposite party of the corresponding subject. Evidence of possession that might seem weak and inconclusive in the case of a parol sale is thus made clear and convincing in the case of an exchange. This is not new doctrine, but has received the sanction of this court in at least two decided cases: *Miles v. Miles*, 8 W. & S. 135; *Reynolds v. Hewett*, 3 Casey, 176. In the present case, if the change of the character of Wesley Culver's possession of the 50 acres, from that of tenant at will to that of owner, might be thought, when standing alone, in a slight degree doubtful, under the evidence, it is rendered perfectly clear by the evidence of Benjamin Moss's possession and absolute control of the 140 acres received in exchange for the former. Even in the case of parol sale or gift, a prior tenancy is not an absolute bar to proof of a change in the character of the possession. *Aurand v. Wilt*, 9 Barr. 54. In such a case it is said that an express surrender of the tenancy, and a resumption of the possession under the contract will suffice.

Upon the whole case we discover no error, and the judgment is therefore affirmed

Cook v. Deerfield Township.

COOK, appellant, v. DEERFIELD TOWNSHIP.

(64 Penn. St. 445.)

Municipal corporation — liability for services on highway.

In an action by contractors for services performed in changing the route of a public road by direction of the supervisors, it appeared that the supervisors had no authority to change the route, but that the contractors had no knowledge of this want of authority. *Held*, that the town was liable. It seems that the town has a remedy over against the supervisors.

ACTION in assumpsit by Cook & Wakeley, for the use of Rossham & Gertsley, against the township of Deerfield for \$200, amount of services performed on highway. The work done consisted of repairs on a public road, by direction of the supervisors, who found it necessary, in making the repairs, to change the route of the road for some distance; and it was on this changed portion of the road that plaintiffs' services were performed. It appeared at the trial that there was no authority for the alteration, but there was no evidence of plaintiffs' knowledge of the supervisors' want of authority. The plaintiffs requested the court to charge:

"That if the jury believe, from the evidence, that there was a public necessity for the change of the Troop's Creek road, in the township of Deerfield, for the distance of thirty-five rods, of forty feet in width on an average, and that the interests of said township were better subserved by such change than by an attempt to repair the road on the old site, such change having been made with the full consent of the owners of the land over which the road passes, the defendant is liable for the value of the work and labor done to effect such change, and the plaintiffs are entitled to recover."

The court refused this point and charged: * * "

"The action of the supervisors, therefore, in changing this road, was without authority of law and void; and no recovery can be had against the township of Deerfield for the value of the work done by Cook & Wakeley under their contract, nor any part thereof; nor for the price stipulated to be paid them in the contract, or any part thereof. Under all the facts given in evidence the jury are instructed to return a verdict for defendant."

Verdict for defendant; the plaintiffs appealed.

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M. F. Elliott, S. F. Wilson and W. H. Smith, for plaintiffs in error

H. Sherwood and J. B. Niles, for defendant in error, cited *Holden v. Cole*, 1 Barr, 303; *McMurtrie v. Stewart*, 9 Harris, 322; *Clark v. Commonwealth*, 9 Casey, 112; *Furniss v. Furniss*, 5 id. 15; *Calder v. Chapman*, 8 Barr, 522.

AGNEW, J. The point on which the plaintiff asked the court below to charge the jury introduced unnecessarily a question as to the right of the supervisors to change the route of the road on which the work was done, and was, on this account, followed by an adverse answer. There can be no doubt of the entire want of authority in the supervisors of a township to change the route of a public road, without the sanction of the court of quarter sessions given in a proper proceeding to effect the change. *Holden v. Cole*, 1 Barr, 303; *Calder v. Chapman*, 8 id. 522; *McMurtrie v. Stewart*, 9 Harris, 322; *Clark v. Commonwealth*, 9 Casey, 112.

But the judge concluded his charge by instructing the jury that, on all the facts in evidence, they should return a verdict for the defendant. It does not appear, however, in the evidence, that the plaintiffs were informed that the change in that part of the road was made without authority. For aught that appears in the evidence, it is fair to presume that the plaintiffs, as contractors for the repair of the road, acted under the belief that this part of the route was changed in conformity to law. This being so, the loss should fall on the township in the first instance, and not on the contractors, the township having a remedy over against the supervisors to charge them in their settlement before the auditors with the illegal expenditure. The reasons for this are obvious. The supervisors have a general authority to repair the public roads of the township and to bind the township for the expense. Their power to bind it is like that of a general agent, whose principal must suffer the loss if the agent exceeds his power in a particular apparently within his authority. Being the authorized agents of the township in the general repair of public roads, it is manifest that those who are employed to work on the roads are not bound to make inquiry beforehand as to the rightful creation of the road on which the supervisor directs them to work. It would be intolerable injustice if those who take contracts from public officers, having competent authority to make them, should be compelled to lose the labor and

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money expended by them, if it should turn out that the officer had misdirected them where to perform the contract.

It was on this principle of general authority on the part of county commissioners to represent the county, that it was held, in *Dauphin County v. Bridenbart*, 4 Harris, 458, that the county was bound for the rent of a house leased by the commissioners for the use of the sheriff; though there was no authority to furnish him with a dwelling. The commissioners therein exceeded their powers, but having a general power to act in behalf of the county, the owner of the house was not bound to inquire into their authority in the particular instance. It is often impossible for individuals to know, or to be able to determine, whether the particular matter lies within the scope of a general agent's power. There are cases where the county is sometimes bound, even where the agent has no general authority. Such are the following: *Commissioners v. Hall*, 7 Watts, 290, where the county was held liable for the expense of a jury kept together in a capital case; *Allegany County v. Watts*, 3 Barr, 462, where the county had to pay the fees of a physician for making a *post-mortem* examination at the instance of the coroner; *McCalmont v. Allegany County*, 5 Casey, 417, where the county was held liable to pay the expenses of an office to keep the records, etc., of the supreme court. There being in this case no evidence that Cook & Wakeley, the contractors, made themselves a party to the illegal act of the supervisors, or were notified to desist on that account, the court erred in directing a peremptory verdict against the plaintiffs.

Judgment reversed, and a venire facias de novo awarded.

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REES, appellant, v. JACKSON.

(64 Penn. St. 422.)

Evidence — telegram.

R. was induced, by means of a forged telegram purporting to come from S., to buy stock of J., and gave in part payment therefor his promissory note. In an action by J. on the note, the copy-telegram received by R. and the record of the receipt of the telegram at the office were offered in evidence; but they were rejected. The original telegram could not be found. *Held*, that this was error, on the ground that the evidence offered was important as a link in a chain of evidence tending to show the privity of J. with the sending of the telegram.

ACTION by A. Reeves Jackson against William S. Rees, commenced January 2, 1868, on a promissory note. The consideration of the note was a certain number of shares of the stock of the Pennsylvania Imperial Oil Company, which defendant had been induced to buy of plaintiff on the 24th of July, 1865, by means of a forged telegram purporting to come from Stroud of Philadelphia. The parties to this action were residents of Stroudsburg. At the trial the note was introduced in evidence, having on it seven stamps, all of which were canceled by defendant's initials, "W. S. R.;" but the initials on three of the stamps could not be proved distinctly to be the defendant's handwriting. The defendant therefore objected to the admission of the note; but it was admitted and exceptions were sealed. The telegram which misled plaintiff was as follows:

" July 24, 1865.

Received 8.30 P. M.

" By Telegraph from Philadelphia.

" To Wm. S. Rees, Stroudsburg.

" No. 1.

" The Penn'a Imperial have made a big strike. Buy all the stock you can under ten (10) dollars.

" Wm. D. STROUD."

The original telegram could not be found; but plaintiff offered the copy in his possession and the record of the receipt of the telegram at the telegraph office. The offer was rejected and exceptions were sealed. Evidence was also introduced to prove that the dispatch

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was originated and sent by Boys, in the name of Stroud, and with the privity of Jackson. Much other evidence was admitted which is referred to in the opinion, but which is immaterial to a correct understanding of the case. Verdict for plaintiff; and defendant appealed.

W. Davis and *H. Green*, for plaintiff in error, cited act of congress, July 13, 1866; *Tripp v. Bishop*, 6 P. F. Smith, 424; *McGovern v. Hoesback*, 3 id. 176; *Walch v. Carwell*, Leg. Int., April 24, 1868, p. 33; *Wigham v. Pickett*, Am. L. Reg., November 1869, p. 701; *Carrigues v. Harris*, 5 Har. 350; *Repsher v. Wattson*, id. 368; *Thomas v. Thomas*, 9 id. 317; *McIldowney v. Williams*, 4 Casey, 492; *Kaine v. Weigley*, 10 Har. 183; *Baltimore & Ohio Railroad v. Hoge*, 10 Casey, 214; *Myers v. Hart*, 10 Watts, 104; *Stauffer v. Young*, 3 Wright, 459; *Huntzinger v. Harper*, 8 id. 204; *Deakers v. Temple*, 5 id. 242; *Dark v. Hanks*, cited Chitty on Bills, 265; *Maples v. Brown*, 12 Wright, 458.

S. Holmes, Jr., and *E. J. Fox*, for defendants in error, cited *Stouffer v. Latshaw*, 2 Watts, 167; *Malson v. Fry*, 1 id. 435; *Bradley v. Grosh*, 8 Barr, 49; *Moore v. Miller*, id. 285; *Gilchrist v. Rogers*, 6 W. & S. 488; *Stine v. Sherk*, 1 id. 201; *Irwin v. Shoemaker*, 8 id. 76; *Benford v. Sanner*, 4 Wright, 10.

AGNEW, J. In ruling out the telegram of the 24th of July, 1865, to the defendant, the court severed the only link between the note in suit and the fraud that begat it. It is on this ruling only that the refusal of the offer of the transfer of the stock as the consideration of the note can be supported. Indeed, there was already ample evidence in the case of this as the consideration, consisting of the admissions of Jackson of the sale of the stock on the 24th of July, the number of shares, and price of \$5.50 per share, the clerk writing the sale of five hundred shares, the note for \$2,250, and the transfer indorsed on the certificate, all dated on the same 24th day of July. Nor can there be any doubt that the forged and fraudulent telegram induced Rees to buy the stock. There is ample evidence of this in the testimony of James H. Stroud and Benjamin S. Jacoby. The only question, therefore, is, whether Jackson was privy to the sending of the telegram to Rees. There was sufficient evidence of this fact to be submitted to the jury. It was not a mere spark dying out in the moment of its birth, but a stream of

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light thrown directly upon the plaintiff, the strength and clearness of which the jury alone could determine. Men have been convicted and punished on circumstances not more strong. Let us examine the evidence with a view to see whether it had sufficient strength to carry it to the jury. That the telegram was false and fraudulent is clear. That it came from one Boys, a broker in Philadelphia, is evident. These being clear facts, the inquiry arises and must be answered satisfactorily, how did it happen Boys should address Rees in Dr. Stroud's name just at the moment when Jackson was anxious to sell imperial oil stock, and to invest in mining stock? Why did Boys think of Rees at all? How did he know that Rees would buy stock, and how did he know that he wanted imperial oil stock? Boys lived in Philadelphia and Rees in Stroudsburg, a hundred miles or so apart. And if, by any possibility, we might suppose Boys knew these things, by some act of divination or spiritualistic insight, how did he know or think of Dr. Stroud as a fit person to influence Rees? And what motive had Boys to act at all? It seems to be impossible to answer these questions except on one supposition, viz., that some one made the suggestion to Boys. A jury would be justified in this conclusion, and then the inquiry would be, who made the suggestion? The first and most natural conclusion on the evidence would be, that it came from some one in Stroudsburg, who had an interest in the result. Up to this point a jury would scarcely hesitate, and then the question is, does the evidence point to the plaintiff? Who had a motive to act on Rees? Jackson was the owner of imperial oil stock, and desired to sell it. This is the kind of stock mentioned in the telegram. Who was likely to think of Rees as a purchaser of this stock? Jackson had inquired for a purchaser, and was told Rees would probably buy it. Who was operating on Rees to buy before the telegram came? Jackson sent word to Rees that his imperial stock was for sale. But Rees failed to come at this call. Some days intervened — this is evident — for Dreher delivered Jackson's message on the Saturday previous to the 24th of July; and it was on the Tuesday or Wednesday preceding Jackson spoke to Dreher. Failing to respond to the message, how was Rees to be influenced to buy? A big strike of oil and a telegram were natural means. Who thought of Dr. Stroud? In the conversations between Jackson and Dreher, the latter had told Jackson that, in buying Bortree's stock, he thought Rees was acting on information

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from Dr. Stroud. Who is Stroud? The cousin and friend of Rees and a cousin of Jackson's wife. Who then was so likely to be thought of as Stroud, or one so fit for the purpose? But a fit instrument to operate in Philadelphia must be found. That Boys was the man is indisputable, for he did it. This is followed by the proof that Boys and Jackson were acquaintances and associates, and that Jackson visited Boys' office in Philadelphia several times in the summer of 1865; and, if the witnesses are believed, their association was of the free and easy kind. So far, the evidence affords considerable probability to the belief that Jackson made the suggestion to Boys to send the telegram to Rees. But in cases of circumstantial evidence there is generally one fact which forms the clinch, and gives a decisive effect to the whole chain. That fact seems to be so here. The telegram arrived at the depot, about a mile away, at 3.30 P. M. It was given by the operator to Troch to be handed to Rees. Troch did not deliver it till about 8 o'clock, at dark. In a few minutes Rees started off directly to Jackson's office, found him and Jacoby there, and the stock was purchased the same evening. But Jacoby, the same person, and therefore there is no room for a mistake of time, testifies that, in the afternoon of the same day, Jackson told him that Rees was coming to his office that night, and he would speak to Rees about the purchase of Jacoby's stock, of which they were then talking. How did Jackson know that Rees would be at his office that night? It was a week or more before that he had sent the word by Dreher to Rees. There is no evidence of any previous arrangement, or conversation about the stock. It was evidently the telegram of the big strike of the imperial which set Rees in motion, and this was not till dark. How then did Jackson know in the afternoon that Rees was to come to his office, unless attributable to the presumed effect the telegram would have on Rees? If this be so, and the jury and not the court must determine the fact, it is evident that Jackson has furnished evidence of his own knowledge that such a telegram would be sent to Rees. Admitting then that fraud is not to be presumed or to be found on vague or slight conjecture, and that the doctrine is exploded, as we have said several times, of the sufficiency of a mere spark or scintilla of evidence to go to the jury, yet we have here a chain of circumstances strong enough to bear the weight of the case into the jury box, and lodge it there for their decision. How far it is full proof of the plaintiff's complicity it

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will be for the jury to say. This carries with it all the other assignments of error except that as to the stamps. As to it, we think there is no error in receiving the note in evidence. The signature to the note was the defendant's; and the initials on the larger stamps were his; and the note was stamped to the requisite amount. This was clearly *prima facie* evidence to carry the note to the jury. The *prima facie* presumption arising from the execution of the note, the full amount of stamps affixed, their actual cancellation, and the initials of the defendant on a part of the stamps, would prevent the court from taking from the jury the fact of an authorized cancellation of the smaller stamps.

Judgment reversed, and venire facias de nova awarded.

HAAK, appellant, v. LINDERMAN.

(64 Penn. St. 499.)

Conditional sale — rights of creditors of vendee.

H. sold and delivered a house car to P., under a bill of sale providing that "said H. reserves the right from said car until fully paid, but said P. shall have the use of said car from date; should said P. fail to comply with this agreement, said H. shall have the right to take said car from said P. as his property." *Held*, that it was a conditional sale, and that the car might be taken under execution by P.'s judgment creditors.

FEIGNED issue under the sheriff's interpleader act, John Haak, claimant and plaintiff, Linderman and Skeer, defendants, to determine the question, whether a certain house car, in the possession of Palm, could be levied on by his judgment creditors. The car was levied upon while in the possession of Palm, under a judgment for \$384.27, obtained against Palm, April 9, 1869, by defendants. Haak also claimed the car by virtue of the following agreement:

"The said John Haak, for the consideration hereinafter mentioned, doth covenant and hath sold, and by these presents doth agree to deliver to: he said B. F. Palm, a certain house car, for which the said Franklin Palm agrees to pay the sum of \$600, in the following manner, to wit:—" (Then follow stipulations for payment.) "The said John Haak, reserves the right from said car until

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fully paid, but the said B. F. Palm shall have the use of the said car from this date; should the said B. F. Palm fail to comply with this agreement, the said John Haak shall have a right to take the said car from the said B. F. Palm as his property, and the said B. F. Palm will forfeit the amount paid on said agreement."

It appeared that \$150 had been paid by Palm on account of the car.

On the trial the court charged the jury: "You are instructed that the agreement between the plaintiff and B. F. Palm is a conditional sale, and a fraud upon the creditors of defendant on the execution; it is therefore your duty to render a verdict in favor of the defendants."

The verdict was for defendants, and plaintiff appealed.

E. Holben and *E. Harvey*, for plaintiff in error, cited *Clark v. Jack*, 7 Watts, 375; *Myers v. Harvey*, 2 Penn. 481; *Rose v. Story*, 1 Barr, 195; *Sargent v. Giles*, 8 N. H. 325; *Henderson v. Lauck*, 9 Harris, 359; *Chamberlain v. Smith*, 8 Wright, 433; *Clemens v. Davis*, 7 Barr, 264; *Rowe v. Sharp*, 1 P. F. Smith, 30.

R. E. Wright, for defendants in error, cited *Jenkins v. Eichelberger*, 4 Watts, 121; *Martin v. Mathiot*, 14 S. & R. 214; *Clow v. Woods*, 5 id. 277; *Rose v. Story*, *supra*; *Waldron v. Haupt*, 2 P. F. Smith, 408; *Welsh v. Bell*, 8 Casey, 12; *Becker v. Smith*, 9 P. F. Smith, 469.

THOMPSON, C. J. The material inquiry in this case is, whether Palm received the car in question from the plaintiff, under a contract of bailment, or on the foot of a purchase. If the former, plaintiff would be entitled to his property in whatsoever hands it might be found claiming against the bailment. If the latter, the creditors of the vendee could levy on it and sell it as the property of the vendee, whether it was paid for or not, and whether the contract for the sale stipulated for the title remaining in the vendor until paid for or otherwise. No valid lien for purchase money where the property is delivered on a contract of sale is worth any thing. 14 S. & R. 214, 1 Barr. 190; 8 Wright, 431; 1 P. F. Smith, 28; 2 id. 408. Any number of cases to the same effect might be added to the list.

The contract between the plaintiff Haak and Palm is in writing, and so plain as to be unsusceptible of any misunderstanding. In the outset it says, "that John Haak, for the consideration hereafter

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mentioned, doth covenant, and hath sold, and by these presents doth agree to deliver, to the said B. F. Palm, a certain house car, for which the said Franklin Palm agrees to pay the sum of \$600 in the following manner." Then follows the stipulation for the payments to be made at several times during a year, within which the whole was to be paid "with legal interest on \$300 until paid." It would surpass the keenest astuteness to make out of this any thing but an actual sale, and it was accompanied with an actual delivery of the car. But then follows the clause in the same agreement that "the said John Haak reserves the right from said car until fully paid, but the said Palm shall have the use of said car from this date; and should the said B. F. Palm fail to comply with this agreement, the said John Haak shall have a right to take the said car from said Palm, as his property, and the said Palm will forfeit the amount paid on said agreement."

No doubt this might be a valid lien or arrangement as between the parties, and it is likely the parties had nothing else in view. But the policy of the law against secret liens renders it utterly worthless as against creditors, and this the cases cited abundantly show. This last clause was in no sense a bailment, but a remedy to enforce performance on part of the vendee, and on failure of which to provide satisfaction to the vendor. Not one of the cases cited by the plaintiff sustains this as a bailment. The furthest they go is, where the contract is a clear bailment with a superadded condition, that at the end of it, or during its continuance, the bailee should have the option to purchase. Such was the case of *Chamberlain v. Smith*, 8 Wright, 431, *supra*. The possession was in that case parted with only on the footing of a bailment. Before the option was exercised, the bailee there parted with the property by sale, and it was sold on execution against his vendee. The bailee gave notice of title and sued the parties and sheriff seizing the same, and recovered. That accords with the principle stated in the outset of this opinion, and is supported by all the authorities. The other cases cited by the plaintiff in error stand on the same footing. The delivery of the property was on a contract of bailment, with a stipulation to purchase. Here the delivery was on a contract of sale, with a reservation of a right of reclamation if not paid for. This right could be exercised only on the grounds of a lien existing in favor of the vendor, which was void as against creditors. These views are very clearly brought out in the case last above cited, and

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in *Rowe v. Sharp*, 1 P. F. Smith, 26; and *Waldron v. Haupt*, 2 id. 408. The argument of the learned counsel for the defendants in error is a very clear demonstration of the accuracy of the charge of the learned judge to the jury, which consisted in a mere direction to find for the defendant, having first stated that the transaction, as shown, was a conditional sale and a fraud upon creditors.

There was no error committed in the charge or in the assignment of error on the bill of exceptions, and the judgment is affirmed.

HAMMETT, appellant, v. PHILADELPHIA.

(65 Penn. St. 146.)

Constitutional law — local assessments for improvement of street.

An act of the assembly authorizing a street already laid out and in good condition, to be taken and improved for a public drive or carriage-way, and providing that the expense of the improvements be assessed upon the property located on the street is unconstitutional, as imposing local assessments for improvements, which are for the general public benefit. (READ and WILLIAMS dissentients.)

SCIRE FACIAS SUB municipal claim by the city of Philadelphia, to the use of Jenkins and Taylor, against Hammett. The writ was issued July 18, 1868, and was founded on a claim filed March 26, 1868, against defendant, who was the owner of a lot on Broad street in Philadelphia, for the payment of \$4,029.04 defendant's proportion of an assessment for improvements of said Broad street. At the time the improvements were begun by Jenkins and Taylor, the contractors, the street was paved with cobble stones in the style universally in use in the city, and the expense thereof had been originally borne by the adjoining lot owners. By an act of the assembly of 1866, the city had been authorized to take the said Broad street as a public drive or carriage-way and improve it, in a manner to be determined by the city councils, at the expense of the owners of the lots abutting on the street. The improvements were made, and Hammett, one of the residents and owners of property on the street, refused to pay his assessment on the ground that the act of assem

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bly authorizing the improvements was unconstitutional in imposing local assessments for improvements, expressed to be for the general, public benefit. The act of assembly was passed March 23, 1866, and is as follows:

" That the city of Philadelphia be authorized and empowered and required to occupy Broad street, in the city of Philadelphia, for its entire length, as the same is now opened or may hereafter be opened, and from curb to curb thereof, except as hereinafter provided, for the uses and purposes of a public drive, carriage way, street or avenue, and to improve the said street, or portions thereof, from time to time, and in whole or in part, with such mode of pavement, paving, macadamizing, graveling or other roadway, as may, in the judgment of the select and common councils of said city, be best adapted to and for the uses and purposes aforesaid; and for that purpose the said councils shall have, and are hereby authorized to enact, such ordinances or resolutions, with such conditions or stipulations as may require the cost of said improvements to be paid for by the owners of property abutting upon said street: *Provided*, that so much of Broad street, as lies between Willow and Prime streets, shall not be subject to the operation of this act for the period of three years from the passage hereof."

On the 24th of October, 1868, judgment was entered for the plaintiff, and damages were assessed at \$4,462.14. The defendant appealed.

C. Guillou and Porter, for plaintiff in error, cited *Sharpless v. Philadelphia*, 9 Harris, 168; *Parker v. Commonwealth*, 6 Barr. 507; *Mott v. Penna. Railroad Co.*, 6 Casey, 1; *Gaulf's Appeal*, 9 Casey, 100

W. McMichael and D. W. Sellers, for defendant in error. *McMasters v. Commonwealth*, 3 Watts, 292; *Hancock Street*, 6 Harris, 26; *Commonwealth v. Woods*, 8 Wright, 113.

SHARSWOOD, J. It may be considered as a point fully settled and at rest in this State, that the legislature have the constitutional right to confer upon municipal corporations the power of assessing the cost of local improvements upon the properties benefited. It is a species of taxation; not the taking of private property by virtue of eminent domain. It was decided in *McMasters v. Commonwealth*, 3 Watts, 292, that in the opening of streets in a town or city, the damage occasioned to some of the lots might be apportioned and

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assessed upon others in the neighborhood improved in value thereby. It is there assumed, as a well-settled principle, employing the words of Chancellor WALWORTH in *Livingston v. New York*, 8 Wend. 85, that when any particular county, district or neighborhood is exclusively benefited by a public improvement, the inhabitants of that district may be taxed for the whole expense of the improvement and in proportion to the supposed benefit received by each. The conclusion seemed logically to follow; for, if a county, district or town can be assessed for a public improvement on the ground that they are particularly benefited, there can be no constitutional reason to exempt an individual from assessment on the same principle. It becomes a mere question of expediency, of which the legislature are the competent and exclusive judges, and not of right. The doctrine is again asserted in *Fenlon's Petition*, 7 Barr. 173; and in the subsequent case of *The extension of Hancock street*, 6 Harris, 26, the constitutionality of such an exercise of the taxing power was declared to be no longer an open question.

On the same principle the validity of municipal claims assessing on the lots fronting upon streets their due share of the cost of grading, curbing, paving, building sewers and culverts, and laying water-pipes, in proportion to their respective fronts, has been repeatedly recognized, and the liens for such assessments enforced. *Pennock v. Hoover*, 5 Rawle, 291; *The Northern Liberties v. St. John's Church*, 1 Harris, 104; *The City v. Wistar*, 11 Casey, 427; *The Commonwealth v. Woods*, 8 Wright, 113; *Mages v. The Commonwealth*, 10 id. 358; *Wray v. The Mayor etc., of Pittsburg*, id. 365.

These cases all fall strictly within the rule as originally enunciated — local taxation for local purposes — or, as it has been elsewhere expressed, taxation on the benefits conferred, and not beyond the extent of those benefits. There is, indeed, no clause in the constitution of Pennsylvania which restricts the power of taxation in the legislature as is to be found in the constitutions of many of our sister States. Yet it must be confessed that there are necessary limits to it in the very nature of the subject. It is very clear that the taxing power cannot be used in violation of provisions in the Bill of Rights, every thing in which is “excepted out of the general powers of government, and shall forever remain inviolate.” There is no case to be found in this State,—nor, as I believe, after a very thorough research, in any other—with limitations in the constitution or without them—in which it has been held that the legislature, by virtue

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merely of its general powers, can levy, or authorize a municipality to levy, a local tax for general purposes. I shall have a word to say presently of two or three of our cases which are supposed to countenance such an idea. It may be shown logically, and that without difficulty, that such a doctrine lands us in this absurd proposition: That the whole expenses of government, general and local, may be laid upon the shoulders of one man, if one could be found able to bear such a burden. A conclusion so monstrous shows that the premises must be wrong. Such a measure would not be taxation, but confiscation. That can only be the consequence of attainder for crime, and not even then to its full extent, for there can be no forfeiture of estate to the commonwealth except during the life of the offender. It is well remarked by Chief Justice ROBERTSON, of Kentucky, under a constitution without restraint on the legislative power of taxation: "An exact equalization of the burden of taxation is unattainable and utopian. But, still, there are well-defined limits within which the practical equality of the constitution may be preserved, and which, therefore, should be deemed impassable barriers to legislative powers. * * The legislature in the plentitude of its taxing power, cannot have constitutional authority to exact from one citizen, or even one county, the entire revenue of the whole commonwealth. Such an exaction, by whatever name the legislature might choose to call it, would not be a tax, but would undoubtedly be the taking of private property for public use, and which could not be done constitutionally without the consent of the owner or owners, and without retribution of the value in money." *Lexington v. McQuillan's Heirs*, 9 Dana, 513. "A legislative act," says Chief Justice BEASLEY, of New Jersey, "authorizing the building of a public bridge and directing the expenses to be assessed on A., B. and C., such persons not being in any way peculiarly benefited by such structure, would not be an act of taxation, but a condemnation of so much of the money of the person designated to a public use." *The Tide-water Company v. Carter*, 3 C. E. Green, 518. "The whole of the public burden," says Chief Justice BLACK, "cannot be thrown on a single individual under pretense of taxing him, nor can one county be taxed to pay the debts of another, nor one portion of the State to pay the debts of the whole State. These things are not excepted from the powers of the legislature, because they did not pass to the assembly by the general grant of legislative power. A prohibition was not necessary. An act of assembly com-

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manding or authorizing them to be done, would not be a law, but an attempt to pronounce judicial sentence, order or decree. *Sharpless v. The Mayor of Philadelphia*, 9 Harris, 168. It is said that the line of distinction between the right of taxation and the right of eminent domain is clear and well defined. Taxation exacts money or services from individuals, as and for their respective shares of contribution to any public burden. Private property, taken for public use by right of eminent domain is taken, not as the owner's share or contribution to a public burden, but as so much beyond his share. *The People ex rel. Griffin v. Brooklyn*, 4 Comst. 419. It has been said by Judge FIELD, of California, now on the bench of the supreme court of the United States, that "money is not that species of property which the sovereign authority can authorize to be taken in the exercise of its right of eminent domain. That right can be exercised only with reference to other property than money, for the property taken is to be the subject of compensation in money itself; and the general doctrine of the authorities of the present day is, that the compensation must be made, or a fund provided for it, in advance." *Burnett v. Sacramento*, 12 Cal. 76. I am not able, and do not feel disposed, to enter the lists upon such a question, but it does seem to me that there may be occasions in which money may be taken by the State in the exercise of its transcendental right of eminent domain. Such would be the case of a pressing and immediate necessity, as in the event of invasion by a public enemy, or some great calamity, as famine or pestilence, contributions could be levied on banks, corporations or individuals.

The obligation of compensation is not immediate. It is required only that provision should be made for compensation in the future. Judge RUGGLES confines the right to exact money by virtue of the eminent domain, to the case where it is for the use of the State at large in time of war. *The People ex rel. Griffin v. Brooklyn*, 4 Comst. 419. I cannot see that there is any such necessary limitation. The public necessity which gives rise to it prevents its being restrained by any limitations as to either subject or occasion. In truth it matters not whether an assessment upon an individual or a class of individuals for a general, and not a mere local purpose, be regarded as an act of confiscation — a judicial sentence or rescript, or a taking of private property for public use without compensation — in any aspect it transcends the power of the legislature, and is void. I regard it as a forced contribution. If the sovereign

breaks open the strong-box of an individual or corporation and takes out money, or, if not being paid on demand, he seizes and sells the lands or goods of the subject, it looks to me very much like a direct taking of private property for public use. It certainly cannot alter the case to call it taxation. Whenever a local assessment upon an individual is not grounded upon, and measured by, the extent of his particular benefit, it is *pro tanto*, a taking of his private property for public use without any provision for compensation. That clause in the Declaration of Rights is, indeed, the sheer anchor of private property, the security of which against the government, as well as all others, is intended in the first section of the ninth article: "All men have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." The dollar which the poor man has earned by the sweat of his brow—the fortune which a rich man has inherited from his ancestors—stand on the same rock, and are surrounded and protected by the same barrier. Invested for comfort and assurance against want in sickness or old age, or cherished as a provision for widow or orphan after he has gone, it is a right which it is despotism to take from him, except for the necessary purposes of government by equal and just taxation. It is none the less so if it be the act of the hydra-headed monster, a municipal majority, or that of a single autocrat. It is the solemn duty of the judiciary, under our constitution, to guard and protect this right of property, as well from indirect attacks under any specious pretext, as from open and palpable invasion. "There being," says Chief Justice MARSHALL, of Kentucky, "no express constitutional declaration or prohibition directly applicable to the powers or subject of taxation, and none which, in terms, secure equality or uniformity in the distribution of public burdens, either general or local, there is no clause to which the citizen can, with certainty, appeal for protection against an oppressive and ruinous discrimination, under color of the taxing power, unless it be that which prohibits the taking of private property for public use without compensation. * * This is the great conservative principle of the constitution, by which the rights of private property are to be preserved from violation under public authority; and we should feel bound to give it, as has heretofore been done, a

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liberal construction for the attainment of so important and valuable an object." *Cheany v. Houser*, 9 B. Mon. 341

It may be said that *Sharpless v. The Mayor of Philadelphia*, 9 Har. 147, and *Kirby v. Shaw*, 7 id. 258, are irreconcilable with the reasoning employed in this opinion. As to the first of these cases it is now practically unimportant, because it has been in effect reversed by the seventh section of the first amendment of the constitution of 1857. It has been seen that it recognizes that there are limits to the taxing power such as are here contended for; and the only doubt can be whether the rule was rightly applied. As to *Kirby v. Shaw*, although a case on the very verge of the principle which is established—local taxation for local purposes—and there are some generalizations in the judgment as pronounced by Chief Justice GIBSON by far too broad, yet ultimately it is put on the ground of peculiar benefit. "The advantage of a county town," says he, "are too well appreciated not to make every village use all its exertions to have a court-house provided for its benefit and convenience. Without a court-house to replace the burnt one, Towanda could not have remained the seat of justice; and as its inhabitants profited by, not only the disbursements of the tax among them, but a permanent increase of their business and an appreciation of their property, they were morally bound to contribution. It was for the legislature to fix the proportion, and we have neither a right or disposition to question their justice." Here, too, the only real question would seem to be as to the application of the principle. *Kirby v. Shaw* has been since followed by this court in the case of the South Street Bridge. *The City of Philadelphia v. Field et al.* (July 2d, 1868), a judgment in which the chief justice and myself were unable to concur.

Assessments on property peculiarly benefited by local improvements, and in consideration of such benefit, are constitutional—thus far have the judicial decisions in this and other States gone, and no further. A few only of the leading cases need be cited. *In the matter of Canal street*, 11 Wend. 155; *Hill v. Higdon*, 5 Ohio (N. S.) 243; *Stryker v. Kelly*, 7 Hill, 9, 23; S. C., 2 Denio, 323; *Goddard, petitioner*, 16 Pick. 504; *Lowell v. Heaully*, 8 Metc. 180; *Garret v. City of St. Louis*, 56 Mo. 505; *Anderson v. Kern*, Draining, 14 Ind. 199; *Sanborn v. Rice County*, 9 Minn. 273; *Weeks v. City of Milwaukee*, 10 Wis. 242; *Creighton v. Mancon*, 27 Cal. 613; *Tide Water Company v. Coster*, 3 C. E. Green, 54

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518. Undoubtedly, the power of taxation is not to be rigidly scanned. Every presumption is to be made in its favor. If the case is within the principle, the proportion of contribution and other details are within the discretion of the taxing power. We may say with Judge PECK, of Ohio: "It is quite true that the right to impose such special taxes is based upon a presumed equivalent, but it by no means follows that there must be in fact such full equivalent in every instance, or that its absence will render the assessment invalid. The rule of apportionment, whether by the front foot or a percentage upon the assessed valuation, must be uniform, affecting all the owners and all the property abutting on the street alike." *Northern Indiana Railroad Co. v. Connelly*, 10 Ohio (N. S.) 159. Or, as in our own case of *Commonwealth v. Woods*, 8 Wright, 113, where it was held, in an instance unquestionably within the general principle, that the assessment when made in pursuance of law is final and conclusive, and cannot again be reviewed by any other tribunal. On the examination of the cases I have found two in which it was attempted, though fortunately without success, to make the owners personally liable for assessments beyond the value of their lots, cases which show how dangerous and liable to abuse is this power of special taxation with all the guards which can be thrown around it. *In the matter of Canal street*, 11 Wend. 155, the court say: "In this case it is assumed and not contradicted that many individuals will be ruined if compelled to pay the assessments, for which they are liable." *In Creighton v. Manson*, 27 Cal. 613, the lot in question, before the grading of the street, for which the assessment was claimed, was appraised for revenue purposes at \$1,400. It was rendered worthless by the grading; yet the attempt was made to make the owners personally liable for its assessment, which was \$1,989.54.

It remains to apply these principles to the case presented to us upon this record. The original paving of a street brings the property bounding upon it into the market as building lots. Before that, it is a road, not a street. It is therefore a local improvement, with benefits almost exclusively peculiar to the adjoining properties. Such a case is clearly within the principle of assessing the cost on the lots lying upon it. Perhaps no fairer rule can be adopted than the proportion of feet front, although there must be some inequalities if the lots differ in situation and depth. Appraising their market values, and fixing the proportion according to these, is a

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plan open to favoritism or corruption, and other objections. No system of taxation which the wit of man ever devised has been found perfectly equal. But when a street is once opened and paved, thus assimilated with the rest of the city and made a part of it, all the particular benefits to the locality derived from the improvements have been received and enjoyed. Repairing streets is as much a part of the ordinary duties of the municipality—for the general good—as cleaning, watching and lighting. It would lead to monstrous injustice and inequality should such general expenses be provided for by local assessments.

This case indeed is still clearer than that which I have put of a simple repairing. Broad street, in front of the lot of the plaintiff in error, was paved only a few years ago in the ordinary way in which all the other streets of the city have been paved—with cobble stones—and whatever advantage there was in his owning property on so wide and handsome a street was paid for by him in the increased cost assessed upon him for the paving. Without any pretense that it has been worn out and required to be replaced by another, it was torn up, and a new and very expensive wooden pavement substituted. The plaintiff in error did not remain silent. He protested and remonstrated, and filed a bill in equity to restrain the work before it began. The city and their contractors can plead no equity against him. It is said that it was all for his interest. But whether he was mistaken or not as to his own interest, he was the judge of that, not this court. The case is not to be decided upon any particular results in this instance, but on general principles which can work with safety and advantage to the public in all other cases. Mr. Hammett may have been specially benefited; though we have no evidence of that on this record, and we have no right to consider evidence derived from any other source, but the next experiment may be unsuccessful and ruinous. It was well said by the court in *The People ex rel. Post v. Brooklyn*, 6 Barb. 209: “If it be true that certain individuals are so greatly benefited, they will be quite as apt to discover where their interests lie as the common council; and if their lands are to be so much enhanced in value, they will, by their contributions, enable the authorities to perform the work at a very trifling expense to the city at large.” The object of this improvement is not to bring or keep Broad street as all the other streets within the built-up portions of the city are kept, for the advantage and comfort of those who live upon it, and

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for ordinary business and travel, but to make a great public drive — a pleasure ground — along which elegant equipages may disport of an afternoon. We need look no further than the preamble of the act authorizing the improvement of Broad street, passed March 23, 1860 (Pamph. L. 299), for evidence that it is for the general public good, not for mere peculiar local benefit. It states it to be “for the uses and purposes of the public, and the benefits and advantages which will inure to them by making and forever maintaining Broad street, in the city of Philadelphia, for its entire length as the same is now opened, or may hereafter be opened, the principal avenue of the said city.” Thus we have special taxation authorized, for an object, avowed on the face of the act to be general and not local, which relieves the case of all difficulty as to the fact. We have only to advance the project a few steps further to see how preposterous is the idea of paying for such an improvement by assessments. In the natural course of things, we may expect that it will be proposed to adorn this principal avenue with monuments, statuary and fountains. Will their cost be provided for in the same way? How much does this plan differ from a proposition to erect new public building on Independence Square, and assess the cost on the lots situated on the neighboring streets? On the same principle, lots on the public squares could be assessed to pay for any new project to beautify and adorn them, no matter how great the expense. It might be argued with equal plausibility that their value was increased by the improvement. We must say at some time to this tide of special taxation, thus far shalt thou go and no farther. To our own decisions, as far as they have gone, we mean to adhere, but we are now asked to take a step much in advance of them. This we would not be justified, by the principles of the constitution, in doing.

Local assessments can only be constitutional when imposed to pay for local improvements, clearly conferring special benefits on the properties assessed, and to the extent of those benefits. They cannot be so imposed when the improvement is either expressed, or appears to be for general public benefit.

There have been several other points raised and discussed on this record, but we are not obliged to consider them, and as the conclusion at which we have arrived that the act of assembly of March 23, 1866, so far as it authorizes the councils of the city of Philadelphia “to enact such ordinances or resolutions with such conditions or

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stipulations as may require the cost of said improvements to be paid for by the owners of property abutting on said street," is unconstitutional and void, disposes of the whole case, it is unnecessary to discuss any other.

Judgment reversed.

READ, J., delivered a dissenting opinion.

WILLIAMS, J., also dissented.

BECK, appellant, v. PARKER.

(65 Penn. St. 202.)

Assignment for benefit of creditors—bankrupt law.

A creditor of P. commenced an action against him in 1869. P. then made an assignment for the benefit of his creditors, and subsequently the action was prosecuted to judgment. *Held*, that the United States bankrupt law of 1867 had no effect upon the assignment, and that it was valid under the law of Pennsylvania as against the judgment-creditor who levied on the assigned property under his judgment.

FRIGNED issue under the sheriff's interpleader act, Parker, plaintiff and claimant, Beck *et al.*, defendants, to determine the right of possession of property levied upon under a judgment obtained by defendants against Perkins, the assignor of the property to plaintiff. The action in which the judgment was recovered was commenced September 23, 1869. The assignment of the property to plaintiff was for the benefit of Perkins' creditors and was made October 11. Judgment in the action was obtained October 13. The execution was issued; the assigned property was levied on; and the assignee, Parker, now plaintiff, claimed the property. On the trial defendants offered to prove, by a witness, that, after the assignment to Parker, Perkins had made another assignment of the same property and antedating the first assignment, to witness and others, with the view of giving them a preference over other creditors, and that this was done in pursuance of an agreement made between witness and said Perkins previous to the first assignment. This evidence was offered to show that the assignment was in fraud of Perkins' creditors; but

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it was rejected, and exceptions were sealed. The defendants asked the court to charge that the United States bankrupt law of 1867 in effect nullified State insolvent laws and rendered this assignment, made in pursuance of Pennsylvania statutes, void. The court refused so to charge; the verdict was for plaintiff; and defendant appealed.

H. C. Parsons and *R. P. Allen*, for plaintiffs in error, cited *Golden v. Prince*, 3 Wash. O. C. 313; *Sturgis v. Crowninshield*, 4 Wheat. 122; *Ogden v. Saunders*, 12 id. 273; 1 Kent's Com. 390, 391; *Maris v. Duron*, 1 Brewst. 429; *Eames' Case*, 2 Story, 322; *Griswold v. Pratt*, 9 Metc. (Mass.) 163; *Parsons on Cont.* 445; *Story on the Constitution*, 1107; *Bankrupt Act of March 2, 1867*.

W. H. Armstrong and *S. Linn*, for defendants in error, cited *Ziegenfuss' Case*, 2 Ired. 464; *Langley v. Perry*, W. S. C. O. Southern Dist. of Ohio, 8 Am. Law Reg. 427; *Sedgwick v. Place*, 1 Bankrupt Reg. 204; *Hawkins' Appeal*, 8 Am. Law Reg. 205; *Pellman v. Hart*, 1 Barr, 263.

SHARSWOOD, J. The important question which has been agitated, whether the enactment of a uniform law on the subject of bankruptcy by the congress of the United States, *ipso facto* suspends the operation of the insolvent laws of the different States, does not arise in this case. A voluntary assignment, by a debtor in failing circumstances, to a trustee, for the benefit of creditors, does not depend for its validity upon any statute, and the acts of assembly which have been passed to regulate it, which require it to be recorded, which compel the assignee to file an inventory and appraisement, and to give security, and which provide for the settlement of his accounts and the distribution of the assets, are no parts of the insolvent laws. The effect of such assignment is not to discharge the assignor from his debts, or to relieve him from liability to imprisonment, except incidentally under the act providing for the abolishment of imprisonment for debt. Where no preference is given — and none can be effectually given under our act of April 17, 1843 (Pamph. L. 273), except for the payment of wages of labor — such assignments secure the equal distribution of all the property of a debtor, *pro rata*, among his creditors, and are not contrary to the spirit of the bankrupt act. To hold them to be void in a contest with execution

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creditors, would be to give preferences, instead of preventing them. The answers of the learned judge below to the defendants' points were therefore correct.

The remaining assignments of error complain of the rejection of five several offers of evidence by the defendants, all of which, however, depend upon the same principle. It was proposed to prove that, in pursuance of an understanding or promise before the assignment, the assignor had, after its date, fraudulently executed and antedated an agreement to deliver to one of his creditors certain articles of property, which had passed under the assignment, and had actually delivered them as a preference or security for his indebtedness. It was not offered to show that the assignee was any party to this fraud, and surely no acts of the assignor, after the assignment, can invalidate it, or afford any evidence from which fraud in fact can be legitimately inferred. When a conveyance is not fraudulent at the time of the making of it, it shall never be said to be fraudulent for any matter, *ex post facto*. Shepp. Touchst. 67. The agreement and delivery proposed to be proved were clearly of no avail to accomplish the object alleged to have been intended. These offers, therefore, were rightfully rejected.

Judgment affirmed.

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KAY, appellant, v. PENNSYLVANIA RAILROAD COMPANY.

(65 Penn. St. 282.)

Railroad company — injuries to infant — negligence — measure of damages.

A child, nineteen months old, strayed from its mother to the railroad track of the Pennsylvania Railroad Company, and was run over by a car, which had been detached from the engine and sent around a curve, on a slight down grade, unattended by a brakeman. The track where the child was injured ran through a lot which the public had been permitted, by the railroad company, to use freely. In an action to recover for the injuries received by the child the judge took the question of negligence away from the jury and charged that no more than \$3,000 could be recovered by reason of the limit in the act of assembly of 1868. The injury happened in 1864 and this action was commenced in 1866. *Held* (1) that, as in this case the negligence alleged consisted of a positive act of carelessness in sending a car around a curve out of sight, on a descending grade, at a place where persons might be expected to be, from the permissive use suffered by the company, the question of negligence was for the jury; (2) that the child was incapable of contributory negligence, and (3) that as the act of 1868 was retrospective as to this case, and, therefore, inoperative, full compensation should be rendered for the injury.

ACTION by Lizzie Kay (by her next friend Allen Kay) against the Pennsylvania Railroad Company, to recover for injuries sustained by Lizzie, a child nineteen months old, from the alleged negligence of defendants. The injury occurred July 3, 1864; and this action was brought October 15, 1866. The facts are stated in the opinion. At the trial the judge reserved the right to enter judgment for the defendant, *non obstante veredicto*; and charged that the damages must be limited to \$3,000, in pursuance of the act of assembly of April 4, 1868, section 2. The jury rendered a verdict of \$8,000; but the judgment was entered for defendants *non obstante veredicto*. Plaintiff appealed.

W. H. Armstrong and *S. Linn*, for plaintiffs in error. It is admissible, in such an action, to prove negligence. 1 Redf. on Rail. 552 *et seq.* Negligence is a question for the jury. *Pierce* on Rail. 282; *Huyett v. The Railroad Company*, 11 Harr. 373; *Railroad Company v. Doak*, 2 P. F. Smith, 379; *Shearm. & Redf. on Negl.* 9, 10, and note 2; *P. & R. Railroad Co. v. Spearen*, 11 Wright, 300; *Frankford*

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& B. Turnpike v. Phila. & Trenton Railroad, 4 P. F. Smith, 350; *Smith v. O'Connor*, 12 Wright, 218; *Rauch v. Lloyd*, 7 Casey, 358; *Penn. Railroad v. Kelley*, id. 372; *Mangam v. Brooklyn Railroad*, 36 Barb. 230; Shearm. & Redf. on Negl., §§ 48-52; *Chiles v. Drake*, 2 Metc. (Ky.) 149; *Barrett v. Midland Railway Co.*, 1 Foster & Finl. 361; *Reg. v. Broke*, id. 514; *Bateman v. Bluck*, 18 Q. B. 870; Glenn on High. 135; *British Mus. v. Finnis*, 5 C. & P. 460. The cause of action arose July, 1864; the act of 1868 could not divest it. Const. U. S. art. 1, § 10; Const. Penn. art. 9, §§ 11, 17; *Bedford v. Shilling*, 4 S. & R. 401; *Dash v. Van Kleck*, 7 Johns. 477; *Tillman v. Lansing*, 4 id. 45; *Kenyon v. Stewart*, 8 Wright, 192; *Gordon v. Ingram*, 1 Graut, 152; *Jackson v. Lamphire*, 3 Pet. 280; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Green v. Biddle*, 8 id. 1; *Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 id. 608; *Hedges v. Rennaker*, 3 Metc. (Ky.) 258; *Thorn v. St. Francisco*, 4 Cal. 127; *Nelson v. Jefferson*, 13 Iowa, 181; Smith's Const. Law, § 366, and cases cited, § 149 *et seq.*; Sedgwick on Stat. and Const. Law, 413.

H. C. Parsons and *H. T. Heardsley*, for defendants in error. Plaintiff was chargeable with the parents' negligence. *Rauch v. Lloyd*, 7 Casey, 371; Shearm. & Redf. on Negl. 51; *Balfour v. Baird*, 30 Jur. 124; *Railroad v. Spearin*, 11 Wright, 303; *Railroad v. Hummel*, 8 id. 377.

AGNEW, J. In giving judgment for the defendants, *non obstante veredicto*, the learned judge took the question of negligence away from the jury. He did this by deciding that the railroad company was in the lawful use of its track, and that the plaintiff was a trespasser. This left out of view two aspects of the case to be found in the evidence—the public use of the ground permitted by the company, and the manner of the accident. The ground was a large open lot traversed by railroad sidings and a canal basin. It was leased by the defendants from another railroad company which used it for the purpose of piling and loading lumber; the railroad tracks and canal basin being nearly parallel and in close proximity. The lot lay in Williamsport, adjacent to large saw-mills, where an immense lumbering business is done. In consequence of this business, teams were crossing the lot, and hands engaged in handling the lumber, and the public were permitted to pass to and fro upon it, and

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along the track where the accident happened, a well worn foot-path was plainly visible.

Children were often to be found there. The siding upon which the plaintiff was injured left the main lumber track and followed the bend of the canal basin, curving considerably at this point. The plaintiff, a child but nineteen months old, lived with her parents in a small shanty on this lot, occupied without objection by the railroad company, and lying between the main track and siding, at about one hundred and forty-two feet from the place of the accident. The injury took place about eight o'clock in the morning of a summer day, and was caused by detaching a lumber car, propelled in advance of the engine, and sending it around the curve in the siding, on a slight down grade, unattended by a brakesman. After running over the child, the car was carried by its own momentum about one hundred and seventy feet beyond the place of injury. At the point on the main track where the car was detached from the engine to run through the opened switch out upon the siding, the siding where the child was injured was not visible to the engineer or conductor on the engine, in consequence of the curvature of the track along the canal basin, and of intervening piles of lumber. The parents of the child were poor, and the mother was employed that morning in washing for herself and others. She had gone out over the track to the canal for water, carrying the child on her arm, and the bucket in her other hand. Returning, she set the child down before a chair with some sugar placed upon it, and engaged again in washing. In three or four minutes she missed the child, which had passed out unobserved. She ran out, called the child, ran around the house and met the conductor carrying the child in his arms. Both of its arms were crushed, and had to be amputated. This is a concise statement of the case on part of the plaintiff.

Conceding the right of the railroad company to the exclusive use of its tracks over the lot, as the learned judge held, the true question is whether the circumstances created a different duty. The ownership of the lot gave to the company the right to use it as most convenient and expedient in moving its cars, and no one can gainsay the right to detach and send cars ahead without a brakesman, even out of sight and around a curve. But the case is altered when, by a license to others, they have devoted this ownership to a use involving their interests and their safety, and by sufferance permitted the public to enjoy a privilege of passage which might bring their per-

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sons into danger. Duties grow out of circumstances, the authorities tell us, and that which in one case would be an ordinary and proper use of one's rights may, by a change of circumstances, become negligence and a want of due care. *Reeves v. Delaware, Lackawanna & Western Railroad Co.*, 6 Casey, 461; *Philadelphia & Reading Railroad v. Spearin*, 11 Wright, 305; *Smith v. O'Connor*, 12 id. 222; *F. & M. Turnpike Co. v. Philadelphia & Trenton Railroad Co.*, 4 P. F. Smith, 350; Shearm. & Redf. on Negl., § 11. Culpable negligence is the omission to do something which a reasonable, prudent and honest man would do, or the doing of something which such a man would not do under all the circumstances surrounding the particular case. Shearm. & Redf. on Negl., § 7. In many cases the law gives no better definition of negligence than the want of such care as men of ordinary prudence would use under similar circumstances. Id., § 11. If, therefore, an owner of property has been accustomed to allow to others a permissive use of it, such as tends to produce a confident belief that the use will not be objected to, and therefore to act on the belief accordingly, he must be held to exercise his rights in view of the circumstances so as not to mislead others to their injury, without a proper warning of his intention to recall his permission. *Barrett v. Midland Railroad Co.*, 1 Foster & Finl. 361; *Bateman v. Bluck*, 18 Q. B. 870. Notice, says ROGERS, J., is required to a man who acts *bona fide*, not to him who willfully and obstinately persists in using that to which he has no title, or pretense of title. *Hepburn v. McDowell*, 17 S. & R. 384. Persons who use their property, so as to hold forth an invitation to others to enter, give a license to do so, for instance, innkeepers, merchants, etc. Even trespasses will ripen into right by suffrance and lapse of time, as a way used for twenty-one years. And a parol license accompanied with an expenditure of money will estop without the lapse of time. *Lefevre v. Lefevre*, 4 S. & R. 241; *Rerick v. Kern*, 14 id. 267. Toleration is, therefore, not to be overlooked in testing a man's right to the use of his property.

In the present case the railroad company, for the benefit of trade resulting to its own profit, built its tracks along the canal basin, and left its lot open for the convenient access of the public in the handling of lumber, and transferring it to the cars upon its tracks. And the lot being thus open to all engaged in that business, it also suffered its tracks to be used by the neighboring population as a way

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across the lot from one part of the city to another. As a consequence, people passed and repassed upon the tracks, and its company and its servants would be led to expect to find them there at nearly all hours of the day. It is not like those portions of the road used solely for the passage of trains, where the company would have not only the right to demand, but reason to expect, a clear track. But the presumption of a clear track at this place could not reasonably arise if the circumstances were such as have been stated. A greater precaution against injury to those thus permitted to use the lot and the tracks of the company became a duty.

This brings us to inquire into the particular conduct which led to the injury of the plaintiff, and whether it was a prudent and proper use of the track to detach and send the unattended car forward in the manner stated. It seems to us it was negligence. Certainly no prudent, reasonable and honest-minded man could think it unattended with danger to persons liable thus to be found on the track to send a car out of sight round a curve on a down grade, uncontrolled and unattended by any one capable of checking it in case of danger. Its only purpose was to save a few hundred feet of travel to the engine by detaching it from the car when in motion, and stopping the engine before it reached the switch, in order to permit it to run forward on the main track to hitch on to other cars. To save this short time and distance a life was periled and a serious injury inflicted. Whether the conduct of those in charge of the engine and car was negligence or not was, therefore, a question for the jury and not for the court, for it involved the finding of the facts on which the duty of care depended. It is the province of the court to instruct the jury upon the principles which must guide their conclusions. But the question of negligence is one of mingled law and fact. The law imposes the duty according to the circumstances, so that negligence, which is the breach of that duty, must necessarily depend on the facts, and they can be found only by the jury. *Huyett v. Railroad Co.*, 11 Harr. 373; *Railroad Co. v. Spearin*, 11 Wright, 305; *Smith v. O'Connor*, 12 id. 218; *Railroad Co. v. Doak*, 2 P. F. Smith, 381; *Sheorm. & Redf. on Negl.*, § 11.

But the learned judge in the court below rested his conclusions as to negligence chiefly on the decisions in *Phila. & Read. Railroad Co. v. Hummel*, 8 Wright, 375, and *Gillis v. Penna. Railroad Co.*, 9 P. F. Smith, 129. We think he mistook their effect. The *Railroad Co. v. Hummel* was not like this case. There the siding on which

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the injury took place run over the lands of others, and was not the subject of any permissive use. The railroad company had paid for its right of way, and had a clear right to a free track, which they had not yielded up or modified by any act of their own. The train of coal cars was lawfully standing on the track ready to be moved, and the conductor had gone along the cars to examine the couplings and couple those that had been uncoupled, and if any persons were in the way of the cars to drive them off. The plaintiff was a boy seven years old. The only witness who saw him at the time testified that he saw him having hold of the cars and running along with them; that the cars had moved about three yards slowly when he saw the boy under the cars, and signaled the conductor who stopped the train, jumped from the locomotive, picked up the boy and carried him to his father's house. There was no proof of the slightest negligence on the part of the company, and the only question was, how far the railroad company owed the surrounding population a duty to signal them before the starting of the train. Eight of the lots occupied by dwellers there were cut in two by the track, and the owners had no way to the back parts of the lots except by crossing the track. The neighborhood was thickly settled, and it was contended these circumstances imposed a duty on the company to take care that no one was injured there, and the negligence alleged was the neglect to whistle. Judge STRONG's opinion opens by saying there is but a single question in the case—whether any evidence was given tending to prove that the hurt of the plaintiff was caused by the negligence or want of ordinary care of the defendants. He then proceeds to show that there was none, and that the blowing of the whistle, or signaling the starting of the cars on the track, was not a duty to the people in the neighborhood. The company's track there was exclusively for their own use. "Precaution," he says, "is a duty only so far as there is reason for apprehension;" and this is the very feature in which that case is distinguished from this.

Nor is *Gillis v. Railroad Co.* any more applicable. That case was well decided on its circumstances, but its principle does not touch this case. The precise ground on which the decision is rested is, that the railroad company had done nothing to invite the public upon the platform that gave way, and therefore no duty lay on them to maintain such a structure as would support the dense crowd that, out of curiosity, periled their persons upon it. The platform was in

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no sense a public way, but was erected for the accommodation of passengers arriving and departing in the train. Though it was open and a general permission to pass over, yet the plaintiff had no legal right there, and his presence was in nowise connected with the purposes for which the platform was erected. He was there merely to enjoy himself and gratify his own feelings, and by no act of the company. But SHARSWOOD, J., proceeds to say: "Had it been the time for the arrival or departure of the train, and he had gone there to welcome a coming or speed a parting guest, it might very well be contended that he was there by authority of defendants, as much as if he was actually a passenger, and it would then matter not how unusual might have been the crowd, the defendants would have been responsible. As to all such persons to whom they stand in such a relation as required care on their part, they were bound to have the structure strong enough to bear all who could stand upon it. As to all others they were liable only for wanton or intentional injury." Thus, in *Gillis v. Railroad Co.*, it will be seen that the negligence alleged was purely of a negative character, in omitting to keep up a structure sufficient to bear the weight of a crowd unexpectedly and exceptionally gathered upon it, for their own curiosity, and for no purpose connected with the use of the railroad. But in the present case the negligence charged consisted of a positive act of carelessness, in sending a car round a curve out of sight, on a descending grade, at a place where persons might be expected to be, from the permissive use suffered by the company. It was the duty of the court, therefore, to have submitted the facts to the jury for their determination, whether there was negligence or not.

The next question is upon the responsibility of a child nineteen months old for contributory negligence. That question has been settled in this State by the cases of *Rauch v. Lloyd & Hill*, 7 Casey, 358; *Penna. Railroad Co. v. Kelley*, id. 372; *Philadelphia & Reading Railroad Co. v. Spearin*, 11 Wright, 304; and *Smith v. O'Connor*, 12 id. 218. In accord with these cases are *Lynch v. Nurdin*, 1 A. & E. (41 Eng. E. L.) 422; *Bridge v. Gardiner*, 19 Conn. 507; and *Robinson v. Bove*, 22 Vt. 213. Where the injury is caused by the actual negligence of the company, the incapacity of a child of this age to know the danger and to avoid it shields it from responsibility for its acts. If there be no negligence on the part of the company, then the incapacity of the child creates no liability, and its injury is its own misfortune, which it must bear. This doc

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trine is explained and illustrated in *Railroad Co. v. Spearin, supra*, and is discussed in *Smith v. O'Connor, supra*. The doctrine which imputes the negligence of the parent to the child in such a case as this is repulsive to our natural instincts, and repugnant to the condition of that class of persons who have to maintain life by daily toil. It is not the case where the positive act of a parent or guardian has placed a child in a position of danger, necessarily requiring the care of the adult to be constantly exercised, as where a parent takes a child into the cars, and by his neglect suffers it to be injured by straying off upon the platform. But here a mother toiling for daily bread, and having done the best she could, in the midst of her necessary employment, loses sight of her child for an instant, and it strays upon the track. With no means to provide a servant for her child, why should the necessities of her position in life attach to the child and cover it with blame? When injured by positive negligence, why should it be without redress? A negligent wrong is done; it is incapable of contributing to it—then why should the wrong not be compensated?

The last question to be noticed is the measure of damages. The jury found a verdict of \$8,000, on the ground of gross negligence; but the court charged that no more than \$3,000 could be recovered, by reason of the limit in the act of 4th April, 1868. Pamph. L. 58.

On the next trial the same question will arise, and we are bound, therefore, to say, that this law is retrospective in its operation on this case, deprives the plaintiff of a vested right, and is inoperative. By the eleventh section of the ninth article of the constitution every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay. This article is declared to be excepted out of the general powers of government, and shall forever remain inviolate. When this injury happened in 1864, a right to recover full compensation to the extent of the damage suffered vested in the plaintiff. She commenced suit in 1866. Evidently the legislature could not, by a retrospective act in 1868, declare that an injury to the extent of \$8,000 should be compensated with the sum of \$3,000. This is a flat denial of a right and a refusal to administer justice. The law of the case at the time when it became complete is an inherent element in it, and if changed or annulled the right is annulled, justice is denied, and the due course of law violated. So this court said in *Menges v.*

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Dentler, 9 Casey, 498. The authorities cited by the plaintiff in error run to the same conclusion. As to cases happening after the passage of the law, we express no opinion. For these reasons the judgment is reversed, and a *venire facias de novo* is awarded.

SHARSWOOD, J., dissented on the authority of *Railroad Co. v. Hummel*, 8 Wright, 375.

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(65 Penn. St. 300.)

Constitutional law — navigation of rivers — obstructions — forfeiture.

By a series of enactments the legislature of Pennsylvania prohibited the floating of saw-logs in the Susquehanna river, between the town of Northumberland and the Maryland State line, "without the same being rafted and joined together or inclosed in boats, and under the control, supervision and pilotage of men especially placed in charge of the same, and actually thereon," under penalty of forfeiture. *Held*, that these enactments were a valid exercise of the police power and the right of eminent domain, and not repugnant to the federal power "to regulate commerce with foreign nations and among the several States," nor a violation of a contract created by legislation between Maryland and Pennsylvania, to the effect that the Susquehanna should be a public highway to the Maryland line.

A forfeiture without notice to the owner of the property, and without an opportunity of being heard on the question of the owner's culpability, is contrary to the provision in the bill of rights, that no one shall be deprived of his property unless by the judgment of his peers, or the law of the land.

ACTION of replevin, No. 18, brought April 28, 1869, by Craig & Blanchard, against Kline, for logs valued at \$8,750, and boards valued at \$150. Also another action in replevin, No. 88, brought July 6, 1869, the same against the same. The pleas were identical in both actions and the facts were similar. The plaintiffs, in the spring of 1868, were the owners of the logs (described in the writs of replevin), and voluntarily put them into the west branch of the Susquehanna river and permitted them to be floated into the main river (Susquehanna) at Northumberland, and down the same, with-

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out said logs being rafted and joined together, or inclosed in boats, or under the control and pilotage of men specially placed in charge, for the purpose of floating them thus loosely to their mills below the line of the State of Maryland. Some of the logs thus floating were captured by defendants, while others were lodged on an island, land of defendants, and seized upon by them. No notice of the seizure was given by defendants to plaintiffs, and plaintiffs did not demand the logs within two months from the date when they were taken up.

The defendants claimed to retain the logs under the following laws:

Act approved December 11, 1866. Pamph. L. 1867, p. 1366; Purd. 1468:

SEC. 1. "That it is hereby declared to be the true intent and meaning of the first section of the act entitled "An act to regulate the taking up of lumber in the rivers Susquehanna and Lehigh and their branches, approved the 20th day of March, A. D. 1812;" that any saw-logs may be taken up under the provision of said section, whether the same be put into the said streams intentionally or otherwise, and whether the same be floated intentionally or otherwise, the true intent and meaning thereof being that no saw-logs may be floated or driven therein, unless rafted and under the pilotage and control of men, and that all saw-logs not so rafted and under the pilotage and control of men shall and may be taken up under the provisions thereof; *provided*, that this section shall only apply to the Susquehanna river, between the town of Northumberland and the line of the State of Maryland; and the person or persons taking up any of said saw-logs so floating shall be entitled to receive from the owners thereof fifty cents for each log before delivering up the same."

SEC. 2. "It shall not be lawful for any person or persons, company or companies, corporation or corporations, to float or direct and authorize to be floated down the Susquehanna river, between the town of Northumberland and the line of the State of Maryland, any saw-logs, without the same being rafted and joined together or inclosed in boats, and under the control, supervision and pilotage of men, especially placed in charge of the same and actually thereon. And any person or persons may take up the said saw-logs, or any of them, if they be found floating loose in said streams, and not under the personal charge of some one upon the same, and shall have the right

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to hold and possess the same against all persons whatsoever; *provided*, that if the owner or owners of said logs or their agents shall appear and demand the same from the captor or captors, and shall and do pay therefor to the said captor or captors fifty cents for each and every saw-log so taken up within two months from the date of their being so taken up, it shall be the duty of the captor or captors to deliver over said logs to the owner or owners; but if no such owner or his or their agents shall appear within said time, and pay or offer to pay to the said captor or captors the said salvage-money, the said saw-logs shall be absolutely forfeited to and become the property of the said captor or captors. *And provided further*, that this act shall not apply to saw-logs now lying in the said stream, nor to any case in which by reason of high water, or from any other casualty, said saw-logs may be swept out of the West Branch and Susquehanna booms."

SEC. 3. "All laws and parts of laws inconsistent with the provisions of this act shall be and the same are hereby repealed."

The act of 20th of March, 1812, 5 Smith, 335; Purd. 613, pl. 9, etc., enacts. "If any logs, shingles, boards or lumber of any kind which may have been or may be put into the river Susquehanna or either of its branches, or into the river Lehigh, and which may be taken up by any person or persons, floating down the waters of either said streams, it shall be the duty of the persons so taking up such lumber to lodge a list by him subscribed, within thirty days thereafter, with the nearest justice of the peace of the town or township where such lumber was taken up, of the number, quality and quantity of the logs, boards or other lumber, with the marks on the same."

Act passed on the 20th of April, 1855. Pamph. L. 646; Purd. 673, pl. 12. "It shall be lawful for any person owning or occupying an island in the Susquehanna river to advertise any lumber lodging on his or her land in the same manner, and under the same terms, as is directed in the act of the 20th of March, 1812, entitled 'An act to regulate the taking up of lumber in the rivers Susquehanna and Lehigh and their branches,' to which this is a supplement."

Supplement to the act of March 20, 1812, passed May 8, 1853. Pamph. L. 529; Purd. 673, 674, pl. 13, etc., viz.:

SEC. 1. "Any person or persons who shall take up any boards or lumber of any kind, logs, timber, shingles or shingle-bolts, found floating in the river Susquehanna or either of its branches, shall,

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in lieu of the compensation now by law allowed, be entitled to a reasonable compensation for all necessary services and expenses in taking up and securing the same, and for advertising it in the manner now by law prescribed.

SEC. 4. "That every justice with whom a list of any such lumber, etc., shall be lodged shall keep a record of his proceedings in the case; and he and the constable shall be entitled to the same fees as are now by law provided for similar services.

SEC. 5. "That the provisions of this act shall apply to any lumber, logs, shingles or shingle-bolts or timber which may lodge upon any islands in the Susquehanna river, or its branches, and be advertised according to existing laws, by the owner of such island.

SEC. 6. "That all laws, or parts of laws, inconsistent with this act, are hereby repealed; *provided*, that the provisions of this act shall not apply to logs, timber, shingles or shingle-bolts, or other property taken up by any incorporated boom company in the commonwealth."

The act of April 10, 1862, provided that lumber put in any boom above Williamsport should be stamped; and repealed act of 1812, 1853, 1855. († P. 404).

"So far as relates to any of the several kinds of lumber mentioned in the first section of this act, having thereon a duly registered mark as aforesaid, in and along the streams and their tributaries mentioned in the first section of this act."

On the 7th of December, 1799, the legislature of the State of Maryland passed an act to incorporate the Delaware and the Chesapeake Canal Co., providing, "That this law shall be of no force or effect until a law be passed by the State of Delaware authorizing the cutting of the canal aforesaid; and until a law shall be passed by the State of Pennsylvania declaring the Susquehanna river a public highway, and authorizing individuals and bodies corporate to remove obstructions therein, at a period not exceeding three years from the 1st of March, 1800." On the 19th of February, 1801, the legislature of Pennsylvania passed an act "declaring that the river Susquehanna, down to the Maryland line, shall be a public highway, any act or law of the commonwealth notwithstanding. And it shall and may be lawful for the Chesapeake and Delaware Canal Co., or any other body corporate, or individuals, to remove all natural and artificial obstructions therefrom," 3 Smith's Laws, 464. In 1825, the assent of congress was given to these acts.

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At the trial the court charged :

"1. We do not consider the act of 1801 unconstitutional, nor do we consider it interferes with the right of Pennsylvania to regulate navigation of the Susquehanna river, so far as it may be to the interest and benefit of the public and those using the stream for the transportation of their goods and commodities.

"2. The act of 1866 is constitutional.

"3. We say to you, that, so far as the logs in controversy were captured by defendants when floating upon the river, there can be no recovery. As to the logs taken from the islands, the plaintiffs are entitled to recover their value, as before stated.

"4. * * * Under the admitted facts and undisputed evidence in the case, the defendants acquired title to the logs captured by them when floating loose in the river — if the act of 11th December, 1866, is constitutional. * * *

"The logs taken up by the defendants, floating loose in the river, not being demanded within two months from the date they were taken up, they were forfeited to and became the property of the captors, and the plaintiffs cannot recover their value."

In No. 18 the verdict was for the plaintiffs for \$684.32; in No. 88 the verdict was for the plaintiffs for \$394.16.

The plaintiffs took out a writ of error in No. 18.

The defendants took out a writ of error in each case.

A. C. Simpson and S. Linn (with whom were *C. J. T. McIntyre, Black & Meredith*), for plaintiffs in error.

S. G. Thompson and B. F. Junkin, for defendants in error.

AGNEW, J. It is a difficult problem now to define the boundaries of State and federal powers. The doctrine of the rights of States pushed to excess culminated in civil war. The rebound caused by the success of the federal arms threatens a consolidation equally serious. In this condition the landmarks of the constitution, as planted by Chief Justice MARSHALL and his associates on the solid ground of reason, and a due regard to the rights of the States and of the Union, constitute the only safe guides of decision. The power of Pennsylvania to legislate upon the navigation of the river Susquehanna, which is the question in this case, involves a federal power exceedingly intimate in its relations to the subjects of

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State sovereignty. The power to "regulate commerce with foreign nations and among the several States, and with the Indian tribes," "cannot stop (says MARSHALL, C. J.) at the external boundary line of each State, but may be introduced into the interior." It comprehends "*navigation* within the limits of every State of the Union, so far as that navigation may be in any manner connected with commerce," either foreign or interstate, and "may therefore pass the jurisdictional lines of the States, and act upon the very waters" to which State legislation applies. *Gibbons v. Ogden*, 9 Wheat. 1. But while thus asserting the great extent of the federal power, the opinion concedes to the State an "immense mass of legislation which embraces every thing within the territory of a State not surrendered to the general government, all of which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are competent parts of this mass." These and others not enumerated constitute police powers — such as are exercised in the passage of laws to promote the peace, safety, good order, health and interests of the State, and are protected by the 9th and 10th articles of the amendments to the constitution of the United States. The powers reserved to the States (says the 45th number of the *Federalist*) will extend to all the objects which in the ordinary course of affairs concern the lives, liberties and property of the people, and the internal order, improvement and prosperity of the State. Or, as said by MCLEAN, J., "all powers which properly appertain to sovereignty, which have not been delegated to the federal government, belong to the States and the people." *New Orleans v. United States*, 10 Pet. 737; and see *Willson v. Blackbird Creek Marsh Co.*, 2 id. 245; *License Cases*, 5 How. 582, 583, 592.

But though this large field of State power is conceded, a difficulty arises sometimes in relation to its subjects when they become the objects of the exercise of the federal power also. Thus says Mr. STORY, in his work on the constitution: "A State may use the same means to effectuate an acknowledged power in itself which congress may apply for another purpose. Congress itself may make that a regulation of commerce which a State may employ as a guard for its internal policy, or to preserve the public health or peace, or to promote its peculiar interests." An illustration will be found in

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the case of *Willson v. Blackbird Creek Marsh Co.*, 2 Pet. 245, in which the authority of a law of Delaware was questioned. The plea stated the creek to be a navigable highway, in which tide ebbed and flowed, and the argument insisted that the law of the State conflicted with the power to regulate commerce. But its validity was sustained on the ground that the erection of the dam was necessary for the benefit of the citizens of Delaware, and not opposed to any law of congress, none having been passed to regulate such streams; and in the expressive language of Chief Justice MARSHALL, it was not repugnant to the power to regulate commerce in its *dormant* state. This distinction, in regard to the exercise of the power by congress, is important as coming from the distinguished author of the opinion in *Gibbons v. Ogden*, sometimes quoted to carry the power of congress further than it was intended by him to advance it — to the extent indeed of holding that a State cannot exercise its power over a subject within the power to regulate commerce, whether congress has legislated on the same subject or not. This opinion is not sustained by the case cited from 2 Peters, or later authorities, and is strongly combated by Chief Justice TANEY in *The License Cases*, 5 How. 578 *et seq.*, who refers to that case and others to show that it was not the opinion of Chief Justice MARSHALL that the mere grant of a power to the general government is to be construed as an absolute prohibition to the exercise of any State power over the subject of it. The question may be considered as now settled in conformity to the opinion of Chief Justice TANEY, by the case of *Cooley v. The Board of Wardens of Philadelphia*, 12 How. 318, which holds the grant of the power to regulate commerce is not exclusive, but that the question in each case depends on the character of the subject, some requiring it to be treated as exclusive and others not so. Opinion of CURTIS, J.

But, without standing on what some may regard as debatable ground, it seems to be clear that when a State exercises her own sovereign power in a matter involving the interests of her citizens, though it may touch upon a subject within the field of the power to regulate commerce, it is not for that reason invalid if it conflicts with no law congress has passed upon the same subject. Thus pilot laws, though regarded as directly affecting a subject of commerce, have been held to be valid. *Cooley v. Board of Wardens*, 12 How. 299; *Pacific Steamship Co. v. Joliffe*, 2 Wall. (U. S.) 450. So a law of Maryland forfeiting vessels engaged in catching oysters in an un-

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lawful manner in the Chesapeake bay is not invalid, though the vessel was duly enrolled and licensed under the acts of congress, and employed in the coasting trade. A law of New York requiring the masters of vessels coming into port from abroad to make report within twenty-four hours of the names, places of birth, of last legal settlement, age and occupation of the passengers, was decided to be good as an exercise of the police power. *City of New York v. Miln*, 11 Pet. 102. In *The License Cases*, 5 How. 504, the laws of Massachusetts, Rhode Island and New Hampshire were held not to be repugnant to the constitution of the United States. A tax in Louisiana on brokers of foreign bills was held not to be repugnant. *Nathan v. Louisiana*, 8 How. 73; see, also, *Weaver v. Fegely*, 5 Casey, 27 — weights and measures; *White v. Commonwealth*, 4 Binn. 418; *Fox v. Ohio*, 5 How. 410 — counterfeiting United States coin. Analogies also will be found in reference to the power over the militia. *Houston v. Moore*, 5 Wheat. 1. The power to establish uniform bankrupt laws. *Sturgis v. Crowningshield*, 4 Wheat. 196. To enact naturalization laws. *Chirac v. Chirac*, 2 id. 269.

We come now to the particular question involved in this case, to-wit: the power of our legislature to prohibit the floating of loose saw-logs in the Susquehanna river, between the town of Northumberland and the Maryland State line, “without the same being rafted and joined together or inclosed in boats, and under the control, supervision and pilotage of men especially placed in charge of the same, and actually thereon.” Act December 11, 1866, § 2, Pamph. L. 1867; App. 1366. This act evidently concerns not only the police power, but the right of eminent domain of the State. It was said by TANEY, C. J., in *Martin v. Waddell*, 16 Pet. 410, that “when the revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters and the soils under them for their common use, subject only to the rights since surrendered by the constitution to the general government.” This language was repeated by MCKINLEY, J., in *Pollard v. Hagan*, 3 How. 229. The constitution of the United States confers no power of eminent domain or of legislation over State territory, except that contained in the 16th clause, 8th section, 1st article, relating to the seat of government and places purchased with the consent of the State for forts, magazines, etc. Hence it was said by the court in the case last cited, that, even if Georgia had, in her compact of cession to

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the United States of the territory of Alabama, granted the municipal right of sovereignty and eminent domain, "such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain within the limits of a State or elsewhere, except in the cases in which it is expressly granted." Hence it was held in that case, that the shores of navigable waters and the soils under them were not granted by the constitution of the United States, but were reserved to the States respectively, and that Alabama, though a new State, had, after admission, the same rights, sovereignty, and jurisdiction over the subject as the original States. This was re-affirmed in *Gilman v. Philadelphia*, 3 Wall. 713. The practice of the States in their exercise of the power of eminent domain, and their right to improve the navigable streams within their boundaries, has conformed to these principles. Each has assumed at pleasure to dam, slackwater, improve the natural channels and bridge these streams, when the interests of the people have made it necessary, in the absence of any act of congress to abridge its power. These streams and their navigation have always been deemed to be subject to the regulating or police power of the State for the protection of the people and of internal commerce, when not in conflict with any act of congress passed under the power to regulate commerce. Pennsylvania has exercised these rights in the improvement of the navigation of the Delaware, the Susquehanna and the Monongahela rivers; as well as the Schuylkill, Lehigh, etc. The character of these public rights will be found to be discussed in *Carson v. Blazor*, 2 Binn. 475; *Shrunk v. Schuylkill Navigation Co.*, 14 S. & R. 71; *Susquehanna Canal Co. v. Wright*, 9 W. & S. 9; *Monongahela Navigation Co. v. Coons*, 6 id. 101.

These State decisions underwent review in *Rundle v. Delaware and Raritan Canal Co.*, 14 How. 80, in which the power of Pennsylvania and New Jersey as joint sovereigns over the Delaware was sustained, and it was held that a license to an individual over its waters was revocable and held in subjection to the *superior rights of the State to divert the water for public improvements*. The State authority is strongly sustained in the power to bridge these large streams. *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 430; *Gilman v. Philadelphia*, 3 Wall. 713; *Passaic Bridge*, 3 id. 782; *Flanagan v. Philadelphia*, 6 Wright, 231. In the first case, of the *Wheeling Bridge*, 13 How. 519, the illegality of the structure was placed

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on the ground that congress had already legislated on the subject, by sanctioning the compact between Virginia and Kentucky, making the navigation free and common to all citizens of the United States. In the second case, in 18 How. *supra*, it was said, the principle is undoubted that the act of Virginia conferred authority to erect and maintain the bridge, subject to the exercise of the power of congress to regulate the navigation of the river. The more recent case of *Gilman v. Philadelphia*, *supra*, re-asserts, distinctly, the principles stated in *Pollard v. Hagan* and *Wilson v. Blackbird Creek Marsh Co.*, *supra*. On the subject of ferries, *Conway v. Taylor*, 1 Black, 603, settles conclusively the power of the State to grant this franchise on navigable streams. From these principles and authorities it appears to be clear that the act of 11th December, 1866, was a lawful exercise of the police power of the State upon a subject within her rightful jurisdiction, for the protection of the navigation of the Susquehanna; and not being repugnant to any law of congress passed to regulate commerce on this river, it is valid and constitutional.

The court below having sustained the position of the plaintiffs, that the legislation of Maryland and Pennsylvania created a contract between these States, that the Susquehanna is a public highway to the Maryland line, and that any corporation or individuals should have authority to remove all natural and artificial obstructions therefrom, we pass to the next question. The plaintiffs assert that the modern mode of driving by floating logs loosely in the stream, and following after them to dislodge those that are stranded, has become a recognized mode of navigation, and therefore that the act of 1866 infringes the contract between the States. This is not strictly correct. Driving, as it is called, is chiefly confined to the west branch of the Susquehanna, where booms have been provided by law for catching the logs and delivering them to their owners. The very driving referred to is itself regulated by law, and is, therefore, no disproof of the power of the State to regulate the navigation. But a contract to preserve the free and public navigation of the river is not infringed by proper regulations which promote the very purpose of the navigation by making it safe and convenient to all, and preventing it from being monopolized and dominated by a few. According to the evidence this mode of using the river is productive of great injury both to the riparian owners and those navigating the river with arks, rafts, boats, etc. In this case 200,

000 logs were collected at a point on the river called Davits, to be floated down to the mills of the plaintiffs below the Maryland line, and after being set afloat were overtaken by a freshet. The effect is thus described by the learned judge in his charge. "Witnesses," he says, "describe the consequences of this drive of logs, overtaken by the flood, as ruinous to the defendants and others owning property along the river. The cultivated islands of the defendants and others were covered with logs, the trees which protected the banks uprooted or broken. The logs, carried over and upon them, formed dams at the head of the island, causing channels to be cut through the grain-fields of fifty feet in width, the length of the island, and logs carried out upon the meadows and low lands adjoining the river, to the distance of a fourth of a mile from the usual channel. In addition to the injury to private property as described by the witnesses, some (who have been pilots on the river for fifteen or twenty years, and experienced in running rafts) say they would not consider it safe to undertake to run a raft with a drive of 200,000 logs floating loose upon the river. Some describe the imminent danger to which they have been exposed. That they can neither land at night, go through the chutes in the dams, nor along the narrow channels when logs are floating thick in the river. Witnesses who saw the drive of 1868 say that an ordinary raft could not have lived among the logs; and that they have known rafts detained till the fall season in consequence of loose logs floating so that they could not safely venture out into the river."

Clearly such a use of the river is improper, and conflicts with the rights of others. *Dubois v. Glaub*, 2 P. F. Smith, 238. We think the State, in the exercise of her sovereign authority and police power, had a right to forbid such a mode of using the stream.

The next question is, whether the mode of forfeiture provided in the law is valid. The 2d section of the act of 1866 forfeits the title of the owner, if the logs be found floating loose in the stream and not in the personal charge of some one upon them, and vests it in the captor, at the expiration of two months, if the owner do not appear within that time and pay the captor fifty cents for every log taken up.

If this means that a forfeiture can take place without notice, as the court below held, and without an opportunity of being heard on the question whether the owner had voluntarily set his logs afloat loose upon the stream, then it seems to us to be contrary to

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the provision in the bill of rights, that no one shall be deprived of his property unless by the judgment of his peers, or the law of the land. The law of the land means by due process of law. 2 Kent's Com 13;* Sedgwick on Stat. and Const. Law (ed. 1857), 610; *Murray's Lessee v. Hoboken Land Company*, 18 How. 276. It does not mean merely an act of the legislature, for that would abrogate all restriction on legislative power. 2 Kent, 13,* in note. "The design of the convention," says GIBSON, C. J., "was to exclude arbitrary power from every branch of the government; and there would be no exclusion of it if such rescripts or decrees were allowed to take effect in the form of a statute." *Norman v. Heist*, 5 W. & S. 173. This provision and those as to the administration of justice in the bill of rights, require that all claims for justice between man and man shall be tried, decided and enforced by the judicial authority of the State and by due course of law. Per LOWRIE, J., *Menges v. Dentler*, 9 Casey, 495. In *Greene v. James*, 2 Curtis, 189, cited in Sedgwick on Stat. and Const. Law, p. 611, Justice CURTIS, in the circuit court of the United States, held that an act of Rhode Island, authorizing a seizure of property in an unlicensed tippling shop, was in violation of the constitution of the State, because it did not provide for notice by due legal means of the nature and cause of the accusation, nor for a trial of the question whether the liquors were held for sale in violation of law. The provision in the constitution of Rhode Island is in the same language as that in our own. This subject was discussed in *Fetter v. Wilt*, 10 Wright, 460, in reference to the act of 22d April, 1822, to prevent the disturbance of meetings held for religious worship, though the point in the case was not decided, THOMPSON and WOODWARD, JJ., holding the law to be unconstitutional. Now it is very clear that the mere fact that a man's property is found floating down the stream is not, *ipso facto*, a ground of forfeiture, so as to deprive him of title. It is the intentional or voluntary act of floating, directing or authorizing to be floated, which the law prohibits. For aught the captor or the public may know the logs might have been carried off by a flood, or by the illegal acts of trespassers. In Doctor and Student, ch. 51, it is said, "though a man waive the possession of his goods, and saith he forsaketh them, yet by the law of the realm the property remaineth still in him, and he may seize them after, when he will." And see Story on Bailm. 55, 59, 85, 86, 87. It is evident, therefore, that title cannot be divested by the mere fact of the

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property being found floating on the stream. That may justify seizure to answer the supposed offense. But to forfeit the title, the owner must have notice, and an opportunity of showing that his property was not voluntarily set afloat on the stream contrary to law. The court below erred, therefore, in holding that the title to the logs found afloat was divested without notice; and we think, also, that there was error in holding that the provision for notice in the act of 1812 is repealed. Evidently it is not repealed by the act of 10th April, 1862, section 7, P. L. 286, as the repealing clause applies only to the stamped lumber mentioned in the first section put into the Susquehanna at or above the boom at Williamsport. Nor is it repealed by the 3d section of the act of 11th December, 1866, repealing all laws and parts of laws inconsistent with the provisions of that act. There is not a word in the act inconsistent with that part of the act of 1812, section 1, which requires the "person taking up such lumber floating down the waters of the said river to lodge a list, by him subscribed, within thirty days thereafter, with the nearest justice of the peace of the town or township where such lumber was taken up, of the number, quality and quantity of logs, etc., with the marks of the same, and requiring the justice to enter the same on his docket, and to cause the same to be published at least three weeks in one weekly newspaper of the county wherein such lumber was taken up." Then the 1st section of the act of 1866 declares it to be the true intent and meaning of the 1st section of the act of 1812, "that any saw-logs may be taken up *under the provisions of said section*, whether the same be put into the streams intentionally or otherwise, and whether the same be floated intentionally or otherwise, the true intent and meaning thereof being that *no saw-logs may be floated or driven therein unless rafted and under the pilotage and control of men, and that all saw-logs not so rafted and under the pilotage and control of men shall and may be taken up under the provisions thereof.*"

Thus the act of 1866 expressly directs that logs floated loosely in the stream, not under the control of men (and which the 2d section proceeds to prohibit, and declare a consequent forfeiture of the logs), shall be taken up under the provisions of the 1st section of the act of 1812. And without this plain language the identity of the subject of legislation and the necessity of notice to make the law valid, require us to hold that the act of 1812 and its supplements are to be construed in *pari materia* with the act of 1866.

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The only objection that can be urged against the charge as to the measure of damages is, that the court assumed that the logs were captured by the defendants under an honest belief that they were forfeited—a matter rather for the jury. The action of replevin lies wherever one man claims goods in the possession of another without regard to the manner in which possession was obtained. But it is equally well settled that upon the question of damages the means by which possession has been taken or retained will be considered. Hence exemplary damages may be given when there has been outrage in the taking, or vexation and oppression in the detention; and on the other hand, an innocent mistake in the taking or detention may reduce the damages to mere compensation. This subject was fully examined in *Herdic v. Young*, 5 P. F. Smith, 176. The court below held that the logs grounded on the islands were not liable to capture and forfeiture under the 2d section of the act of 1866. Still it was a question for the jury, whether the defendants had not made an innocent mistake in not proceeding according to the act of 1812. *Prima facie*, the value of the property when and where it is replevied is the measure of compensation; but this may be varied by the circumstances as to the character of the taking and the removal to the place of the replevy.

Judgment reversed, and a venire de novo awarded.

The defendants' writs of error were argued by

S. G. Thompson and *B. F. Junkin*, for plaintiffs in error.

A. C. Simpson and *S. Linn* (with whom were *C. J. T. McIntire*, *Black & Meredith*), for defendants in error.

AGNEW, J. The main questions arising in this case have been considered and disposed of in the writ of error of *Craig & Blanchard v. Kline*. Opinion just read. In the present writ of error, the only question is upon the right of the defendants to take up the logs found lying upon the islands and not afloat. We have said, in the other writ of error, that the 2d section of the act of 1866 must be taken in connection with the former acts on the same subject, and that the proceedings and notice required by the act of 1813, as altered and modified by its supplements, are applicable to seizures of logs under the act of 1866. The defendants had a right to take

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up the logs lying on the islands, under the acts of 1812, 1853, and 1855, as explained by the 1st section of the act of 1866. But having failed to comply with their provisions as to the mode of taking up the logs, the plaintiffs were entitled to recover, so that substantially the instruction of the court led to the correct result, and the judgment is affirmed.

KENNEDY, appellant, v. JOHNSTON.

(65 Penn. St. 451.)

Lunatic — power of committee to elect for widow.

The committee of a lunatic widow cannot make an election for her between the provision made for her, in the will of her husband, and her dower at common law, without the sanction of the court.

ACTION of dower by Max Kennedy, committee of Sally Mahon, lunatic, widow of Robert Mahon, against George Johnston. The material facts are stated in the opinion. The verdict was for defendant and plaintiff appealed.

F. W. Kimmell (with whom were *J. R. Orr* and *Kennedy & Stewart*), for plaintiff in error.

J. McD. Sharpe (with whom were *Stumbaugh & Gehr*), for defendant in error.

Act of June 13, 1836, § 15 *et seq.*, Pamph. L. 596, Purd. 682, pl. 22, etc.; *Hehn v. Hehn*, 11 Har. 415; *Guthrie's Appeal*, 4 id. 321. The right of election is personal. *Boon v. Boon*, 3 Har. & McH. 93; *Collins v. Carman*, 5 Md. 503; *Lewis v. Lewis*, 7 Ired. 72; *Merrill v. Emery*, 10 Pick. 507. If the widow is under disability the court will elect for her. *Pulteney v. Darlington*, 2 Ves. Jr. 560; Roper on Husband and Wife, 571, note; *Noys v. Mordaunt*, 2 Vern. 581; *Streatfield v. Streatfield*, Cas. temp. Talb. 176; 1 Leading Cases in Equity (White & Tudor), Hare & Wallace's Notes, 271, etc.; *Boughton v. Boughton*, 2 Ves. 12; *Bar v. Bar*, 3 Bro. P. C. 173; *Chetwynde v. Fleetwood*, 1 id.; *Vane v. Lord Dungannon*, 2 S & L

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133; *Davis v. Page*, 9 Ves. 350; *Ebington v. Ebington*, 5 Madd. 117; *Wilson v. Lord John Townshend*, 2 Ves. Jr. 693; *Goodwyn v. Goodwyn*, 1 Ves. Sr. 228; *Bigland v. Huddleston*, 3 Bro. C. C. 285, note; *Gretton v. Howard*, 1 Swanst. 413; *Ashburnham v. Ashburnham*, 13 Ves. Jr. 1111; *Robertson v. Stephens*, 1 Ired. Eq. 247; *McQueen v. McQueen*, 2 Jones' Eq. 16; *Tiernan v. Roland*, 3 Har. 430; *Addison v. Bowie*, 2 Bland. 606.

AGNEW, J. Robert Mahon, the husband of Sally Mahon, died in May, 1845, and she was not declared a lunatic until August, 1867. During all this interval she took, under the will of her husband, the provisions made for her. Had she been sane, there could be no doubt that the acts of acceptance under the will, as given in evidence, would have been deemed an election *in pais* and barred her dower. *Cauffman v. Cauffman*, 17 S. & R. 16; *Light v. Light*, 9 Har. 407; *Bradford v. Kents*, 7 Wright, 474. But if she were insane from the period of her husband's death, of which there was some evidence, she was without capacity to elect, and this raises the only question we need discuss — the power of Dr. Kennedy, as her committee, to elect for her without the sanction of the court of common pleas. In view of the doctrine of election, as administered in equity, and of the powers conferred on the committee of a lunatic, which are entirely statutory, he had not the power without application to the court. Under the 11th section of the act of April, 1833, relating to wills, a devise or bequest by a husband to his wife, of any portion of his estate or property, is deemed and taken to be in lieu of her dower in his real estate, saving her right to elect her dower, which means at common law. *Shaffer v. Shaffer*, 14 Wright, 394. She is, therefore, put to her election between the provisions of the will and her dower, while her default to appear and elect under the act of 29th March, 1832, section 35 (Pamph. L. 200), after citation served, is deemed to be an acceptance of the provision of the will, and bars dower. The evident leaning of the law, in the absence of an election of dower, is toward the will. The choice thus presented by the law is one for a judicious consideration — one of judgment to be exercised upon a view of the circumstances. The right is also personal, to be exercised by the widow herself, or, if she be incompetent because of unsoundness of mind, by the court which has the care of her estate, unless there be a statutory power committed to the committee. In Maryland and North Carolina, it has been held that her

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right of election is personal, and can be exercised only by herself. 1 Washb. on Real Prop. 272*, citing *Boone v. Boone*, 3 Har. & McH. 93; *Collins v. Curman*, 5 Md. 503; *Lewis v. Lewis*, 7 Ired. 72. In England, in cases of election, generally, the jurisdiction is exercised by the court of chancery, which has also the care of the persons and estates of persons *non compotes mentis*. 2 Maddock's Ch. 48 to 60; 2 Story's Eq., §§ 1075, 1077, 1080, 1097; *Cauffman v. Cauffman*, 17 S. & R. 24, 25, 26. In the case of infants and married women, the court of chancery, when necessary, will refer the matter to a master to inquire as to what would be most beneficial to the infant or *feme covert*, in order to make the proper decree. See authorities collected in note, White & Tudor's Leading Cases in Equity, p. 272; also note to *Lady Cavan v. Poultney*, 2 Ves. Jr. 563, Sumner's Edition.

In this State the 5th article of the constitution, section 6, confers on the court of common pleas the power of a court of chancery, so far as relates (*inter alia*) to the persons and estates of those who are *non compotes mentis*. The act of 13th June, 1836, relating to lunatics and habitual drunkards (Pamph. L. 592), was passed to carry out this provision of the constitution. It is under this act the committee derives all his powers, and unless the power to elect can be found in the law or be fairly inferred from its original terms, it does not exist. It is obvious, there is no such power conferred in words, general or special, and there appears to be nothing in the character and nature of the duties enjoined from which the power can be drawn. When properly qualified the law confers on the committee the management of the real and personal estate of the lunatic with power to apply the income only to the payment of his debts, and the support of himself and his family. But beyond this the committee cannot go in disposing of the estate without the aid or sanction of the court. If the income be insufficient the principal cannot be used, or the real estate converted without the direction of the court. To the court belongs the power of making orders touching the care and custody of the person, and the management and safe-keeping of the estate, of the lunatic, necessary and proper for the purpose. The election of one of two things when only one can be chosen for the lunatic is undoubtedly a judicial not a ministerial act, and belongs to the court and not to the committee. The act of election settles the title, and makes that absolute which was before uncertain and optional. Where the title may attach to either

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of two subjects of property by election, it requires a comparison of benefits, and a choice to settle the title upon one of them absolutely. This the committee undoubtedly cannot do from the provision of a mere power of management, for that implies a title already to the thing to be managed, and for the same reason the power to elect does not flow from a power to sue for and recover the property of a lunatic. It also implies a pre-existing title in the lunatic; while the election is required to be made before title absolutely accrues. It was therefore not in the power of the committee of his own motion to relinquish the provision made for the wife in the will of the husband, and cast himself upon the dower. It was his duty to apply to the court of common pleas having jurisdiction over the person and estate of the lunatic for leave to elect the dower, which the court would grant only on due consideration of the advantages and disadvantages of the choice. After such a decree he could then proceed to have a record of his election made in the orphans' court, under the provisions of the act of 29th of March, 1832, and be in a position to recover the dower if denied to him.

This substantially disposes of all the errors assigned, and the judgment is affirmed.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

WALSH V. POWERS, appellant.

(43 N. Y. 23.)

Infancy — ratification of contracts.

The defendant, while an infant, purchased certain mortgaged real estate, and in the deed to her covenanted to pay the mortgage. She thereafter sold the real estate at an advanced price. Some years after she became of age, the mortgage was foreclosed by action, in which she was made a party and appeared. A judgment thereon, for deficiency, was entered against her grantor *Held*, that the covenant was voidable on the part of the defendant, and that a retention of the fruits of her sale after she became of age was not an act in affirmance of the contract, nor was the appearance in the foreclosure suit an act tending to ratify her obligation.

APPEAL by defendant from judgment of general term of supreme court in second judicial district, affirming a judgment for plaintiff.

One Edward A. Walsh gave a mortgage upon certain real estate owned by him, to secure the payment of \$3,000. Subsequently, he sold and conveyed the mortgaged premises to defendant for the consideration of \$9,300. In the deed of conveyance, the defendant assumed the payment of the mortgage. The defendant was at that time an infant, and also was, and has since remained, a married woman.

About seven months afterward, the defendant conveyed the mortgaged premises to one Brouwer. The consideration of the

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deed was \$12,000, and Brouwer therein assumed the payment of the mortgage.

The mortgage was, subsequent to the defendant's reaching her majority, foreclosed by action in which she was served with a summons, complaint, and notice of object of action. She appeared by attorney in such action. The property was sold under foreclosure and failed to bring the amount due by \$1,504.04, for which deficiency judgment was entered against Edward A. Walsh, who paid the same. He assigned his claim, under the covenant in the deed to defendant, to the plaintiff's testatrix, who commenced this action on such covenant.

The case was tried by the court without a jury. The court found that the defendant was only nineteen or twenty years of age when she bought, and that she retained the estate conveyed to her, and the proceeds thereof, but did not find whether she was of age or not when she sold to Brouwer.

Ira D. Warren, for appellant.

Samuel Hand, for respondent.

ALLEN, J. The infancy of the defendant, at the time of the alleged undertaking upon which the action is based, appears by the record as found by the judge at the trial upon the evidence. The obligation was therefore voidable at her option, and the action cannot be maintained unless ratified and affirmed after she attained her majority; and the *onus* of showing such ratification was upon the plaintiff. A continuance in possession of the premises, the conveyance of which constituted the consideration of her contract, and a sale of the same by her after she became of age, would have been an affirmance of the transaction by which she acquired the title, and entitled the plaintiff to recover in the action. *Lynde v. Budd*, 2 Paige, 191; *Henry v. Root*, 33 N. Y. 526; *Bryden v. Bryden*, 9 Metc. 519.

So, too, the retention of the property, and an omission to disaffirm within a reasonable time after arriving at the age of twenty-one years, would have operated as an affirmance of the contract, and been an answer to the defense of infancy. *Kline v. Beebe*, 6 Conn. 494; *Cecil v. Salisbury*, 2 Vern. 324. An infant will not be permitted to retain property purchased by her and at the same time repudiate the contract of purchase. *Kitchen v. Lee*, 11 Paige, 107

But in this case, although the fact of infancy at the time of the alleged contract is expressly found, which entitled the defendant to a judgment, unless by some act, after she became of age, she had ratified and affirmed the contract, no such act is found. The affirmance of the contract, as suggested, was a fact to be proved by the plaintiff, and to be affirmatively found by the judge, to avoid the defense of infancy clearly established. While every intendment will be in support of a judgment, and nothing will be taken by inference against it upon appeal, this court cannot infer or assume the existence of a fact lying at the foundation of the action, in the absence of any finding upon the subject, or evidence warranting such a finding. Omissions and defects in a finding may be supplied by inference, but not the entire want of finding, in the absence of evidence of the necessary fact appearing in the case. This defense of infancy is established by the decision and findings of the judge, with no fact in avoidance of it. It is true that the judge, as "a conclusion of law, finds that the acts of the defendant, after reaching the age of twenty-one years, were a ratification of the obligation," etc. But he does not find any act to have been performed by her after that period, except the appearance of an attorney in the action to foreclose the mortgage; nor does he find that by her acts she ratified the contract after becoming of age, even if such finding, without specifying the particular acts relied upon, would have been sufficient; and neither the evidence nor the findings and statements of the judge show that the defendant had attained her majority at the time of the sale of the premises by her. Indeed, the inference from the case is rather adverse to such a conclusion. A possession or retention of the fruits of her sale, after she became twenty-one years of age, if such fact was clearly established, was not an act in affirmance of the contract with the plaintiff's testator. It was not the exercise of any control over the property conveyed. A tender of payment by her to her grantor, or his representatives, of the moneys received by her, would not have been a disaffirmance of the contract.

The appearance in the foreclosure suit was not an act tending to ratify her obligation. She was not called upon to interpose the defense of infancy in that action. It would have been unavailing for any purpose. The question could not have been tried, and was not material to any issue that could have been formed there.

Judgment reversed and new trial ordered.

Freeman v. Freeman.

FREEMAN, appellant, v. FREEMAN.

(43 N.Y. 34.)

Parol grant of real estate — rights of parties in possession under.

The plaintiff, owning a piece of wild land, told the defendants that the premises should be theirs as long as they lived, and put them in possession of the same. The defendants occupied the premises for a number of years, and made extensive improvements upon them. *Held*, that the expenditures made upon permanent improvements constituted, in equity, a consideration for the promise of the plaintiff, and that the performance of the promise, although by parol, could be enforced in equity, and that an action of ejectment would not lie against defendants in possession.

APPEAL from order of general term of supreme court in sixth judicial district, reversing judgment for plaintiff and ordering a new trial.

The plaintiff, in the year 1860, purchased a place containing forty acres of land, and situated in Cortland county. Soon afterward he put the defendants, one of whom is plaintiff's son, and the other such son's wife, in possession of the place. Before doing so, he told them that the premises should be theirs as long as they lived, and afterward said to them that he had bought the place for a home for them, and gave it to them. The defendants cleared a number of acres on the place, built a house, and made other improvements. The defendant, plaintiff's son, afterward left his wife and family and went to live with his father. Subsequently this action of ejectment was brought by plaintiff. Plaintiff's son did not defend. (The decision at general term is reported in 51 Barb. 306.) The plaintiff appealed to this court.

M. M. Waters, for appellant.

Minor & Kern, for respondents.

GROVER, J. As the order of the general term does not show that it was based upon errors of fact, it must be assumed by this court to have been based upon errors of law only. The facts must be assumed to have been correctly found by the referee. The only legal questions arise upon the exception taken by the respondent to the legal conclusion drawn by the referee from the facts found by him. That conclusion was, that although the plaintiff gave said premises to the defendant, yet said gift, being by parol, was not valid

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and passed no title, either legal or equitable, to the premises set out in the complaint, and therefore he ordered judgment for the plaintiff for the recovery of the possession thereof. If this legal conclusion from the facts found be correct, the general term erred in reversing the judgment, and the order appealed from must be reversed. While the evidence contained in the case and exceptions cannot be looked into for the purpose of finding additional facts, as a ground for the reversal of the judgment, yet it may be for the purpose of determining the meaning of the findings of the referee. When these are read, aided by this light, the referee finds that when the plaintiff purchased the lands in controversy, being about forty acres of land, wild, with the exception of about six acres which had been wholly or partially cleared, he gave it to the defendants. That is, that he promised to give it to them for their lives and the life of the survivor, in case they would move to and reside thereon, and that, in pursuance of such promise, the defendants moved to the premises and occupied the same from February, 1860, to the time of the trial of the action. That the defendants cleared twelve or fifteen acres of the land and fenced the same, and built an addition to the house upon the premises, being somewhat assisted therein by the plaintiff. That the defendants have paid a portion of the taxes assessed upon the land. I have assumed that the referee, by the words "gave the land to the defendants," meant to be understood, that he promised to give it to them. That such was his meaning appears from the evidence, as there was no evidence of any attempt at the former, while the proof of the latter was ample. The question then is, whether a parol promise by one owning lands to give the same to another will be enforced in equity, when the promisee has been induced by the promise to go into possession, and, with the knowledge of the promisor, make comparatively large expenditures in permanent improvements upon the land. It is and must be conceded, that if the promise by parol was to sell the land for a valuable consideration to be paid therefor by the promisee, such promise under this precise state of facts would be enforced. The ground upon which this equitable jurisdiction is exercised, although sometimes said to be part performance, really is to prevent a fraud being practiced upon the parol purchaser by the seller, by inducing him to expend his money upon improvements upon the faith of the contract, and then deprive him of the benefit of the expenditure, and secure it to the seller by permitting the latter to avoid the per-

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formance of his contract. In the case supposed, there has been no part performance of the contract, strictly speaking, except the taking possession, no part of the purchase-money having been paid, and yet the cases are numerous where performance of such contract has been decreed in equity, where possession has been taken under the contract and large expenditures upon permanent improvements made. In the present case, possession has been taken under the promise and the expenditures upon improvements made, yet it is insisted that equity will not enforce the promise for the reason that it was to give, instead of having been to sell the land for a valuable consideration. Permitting the promisor to avoid performance operates as a fraud as much in the latter as in the former case, so far as expenditures upon improvements are concerned. The counsel for the appellant insists that there has been no part performance of the contract to give the land. The answer to this is, that possession has been taken, and valuable improvements made upon the faith of the promise. These acts constitute part performance by the respondents. It is true that the plaintiff has done nothing by way of performance on his part. It is not necessary that he should. Part performance by the party seeking to enforce the contract is sufficient. It is further insisted, that an executory promise, not founded upon any valuable consideration, is a mere nude pact, furnishing no grounds for an action at law, and that performance of such a promise will not be enforced in equity. This is true so long as the promise has no consideration. Any thing that may be detrimental to the promisee or beneficial to the promisor in legal estimation will constitute a good consideration for a promise. Expenditures made upon permanent improvements upon land with the knowledge of the owner, induced by his promise, made to the party making the expenditure, to give the land to such party, constitute in equity a consideration for the promise. *Lobdell v. Lobdell*, 33 How. 347; *id.* 1, 32; *Crosbie v. McDaul*, 13 Ves. 147; *Shephard v. Bivin*, 9 Gill, 32; 3 Pars. on Cont. 359. The statute of frauds has no bearing upon the case. If the promise reduced to writing could, under the circumstances, be enforced in equity, it may be although by parol. 2 Stat. at Large, 139, § 10. The order granting a new trial must be affirmed, and judgment final upon the stipulation rendered against the plaintiff.

Order of general term affirmed and judgment for defendant ordered.

SHEPPARD V. STEELE *et al.*, appellants

(43 N. Y. 32.)

Lien on vessels under State law.

A claim for labor upon the hull of a vessel, while yet in process of construction before launching, is not a maritime contract, and the United States admiralty courts have no jurisdiction for its enforcement.

A State statute, a portion of whose provisions give a lien upon vessels and furnish a means of enforcing it in cases of contracts not maritime, and as to which there is no admiralty jurisdiction, will be upheld even though such statute is unconstitutional and void in relation to particular cases covered by its terms.

The plaintiff performed blacksmith work on a vessel being built at a ship yard in this State. *Held*, that the New York statute, entitled "An act to provide for the collection of demands against ships and vessels," passed April 14, 1862, was not in conflict with the United States constitution or the judiciary act so far as it applied to a lien claimed by plaintiff.

APPEAL from judgment of general term of supreme court in third district affirming judgment upon report of referee.

The facts appear in the opinion.

S. L. Stebbins, for appellants, cited *In re Josephine*, 39 N. Y. 19; 1 Conk. Adm. 73; Bur. Law Dict. "Material Men;" *Harper v. The New Brig*, 1 Gilp. 536; Benedict's Adm., § 264; *De Loiro v. Boit*, 2 Gall. 466, 467, 475; *The General Smith*, 4 Wheat. 438, 443; *Ferran v. Hosford*, 54 Barb. 200; *Wynehamer v. People*, 3 Kern. 378, 487.

F. L. Westbrook, for defendant, cited *Ferry Co. v. Beers*, 20 How. (U. S.) 393; *McGuire v. The Goliath*, 21 id. 248; *Foster v. Busted*, 100 Mass. 409; *The Ship Francis Palmer*, MS., Opn. of Justice NELSON; *The Belfast*, 7 Wall. 624 to 646; *Com. v. Hitchings*, 5 Gray; *Comm. v. Clapp*, id. 100; *People v. Toyndee*, 3 Kern. 441; *Fisher v. McGirr*, 1 Gray, 21; *In re Joseph E. Caffé*, Olcott, 401, 404; *Hancox v. Dunning*, 6 Hill, 494

FOLGER, J. In 1866 one Fox, at his shipyard in South Rondout, in Ulster county, built the hull of a vessel for Steele and others, the

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appellants. Sheppard, the plaintiff, did the blacksmith work on the vessel. For his claim for that work, he assumed that he had a lien on the vessel, by virtue of the statute of this State, entitled, "An act to provide for the collection of demands against ships and vessels," passed April 24, 1862. He took proceedings under that act, and by virtue of a warrant issued by the county judge of Ulster county, he seized the vessel. The appellants gave a bond, under the act, for the discharge of the vessel. In the action brought by Sheppard on that bond against the appellants they raised the question that the act of 1862 is in conflict with the federal constitution, and on that question, with others, the case is brought here. The appellants rely upon the decision of this court in the matter of *The Steamboat "Josephine,"* 39 N. Y. 19. It was there held, that so far as relates to a maritime contract, the constitution of the United States, declaring that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction; and the judiciary act of congress, approved 24th September, 1789, conferring upon the federal courts exclusive jurisdiction in all admiralty and maritime causes, render unconstitutional and void this act of the legislature.

This was the case of a domestic vessel, which was enrolled at the custom house in New York city, and her home port was there. She was engaged in traffic between that port and Monmouth county, New Jersey. The claim against her was for supplies furnished her at the home port. It was sought to be enforced *in rem* in the courts of this State. It was decided in that case that the claim was on a maritime contract; that there was no lien for the claim under the maritime law which could be enforced *in rem*, in a court of admiralty; that where a statute gives such a lien, courts of admiralty will not enforce it; but that the courts of admiralty had jurisdiction in a suit *in personam* to enforce payment of this claim for supplies; that having such jurisdiction it was exclusive, except such concurrent remedy as is given by the common law; and that the proceedings taken in the case, in the courts of this State, could not be enforced. And the statute above referred to was pronounced in conflict with the constitution of the United States and its judiciary act. That decision is placed upon the facts appearing in that case. It holds that, in such a case as they show, the act of 1862 can give no right to the State courts to act, inasmuch as so far it is inoperative. But those facts make a case quite

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different from that before us. The claim there was for supplies furnished to a vessel engaged in the prosecution of the business for which she was built and owned. It was a maritime contract, and fell within the exclusive jurisdiction of the admiralty courts. The claim here is for labor upon the hull of a vessel, while in the process of construction, before launching, while yet on the land. This is not a maritime contract. It is one relating to a subject on the land, and it is to be performed on the land. The admiralty courts have no jurisdiction for its enforcement. *Foster v. The Richard Busteed*, 100 Mass. 409; *Ferry Co. v. Beers*, 20 How. (U. S.) 393. And, though the act of 1862 is held by the case in 39 N. Y. to be unconstitutional and void in relation to particular cases covered by its terms, it may yet be valid to all intents and purposes in its application to other cases within the scope of its provisions, but varying from the former in particular circumstances. And this though the variant provisions be contained in the same section, if they be distinct and separable, so that one may stand though the other fall. If they are not essentially and inseparably connected in substance, some may be kept while others are rejected. *Golden v. Prince*, 3 Wash. C. C. 318; *Commonwealth v. Hitchings*, 5 Gray, 482. There is no objection, then, to upholding the act of 1862, in such of its provisions as give a lien upon vessels and furnish a means of enforcing it, in cases of contracts not maritime, and as to which there is no admiralty jurisdiction. The act can be sustained and applied to the case before us. It follows, then, that this position taken by the appellants is not tenable.

The remainder of the opinion relates to the validity of the law under the State constitution, and whether the plaintiff complied or not with its provisions.

Judgment affirmed.

NOTE. — See *Foster v. The Richard Busteed*, 1 Am. Rep. 125. — REP.

Austin v. N. J. Steamboat Company.

AUSTIN v. N. J. STEAMBOAT COMPANY, appellant.

(43 N. Y. 73.)

Negligence — steamer passing grounded tow.

The defendant's steamer St. John, in attempting to pass a grounded tow belonging to plaintiff, instead of taking the ordinary channel, which was on the west side of the tow, went to the east side, the pilot supposing that the channel had changed. The pilot knew that the tow was aground. *Held*, that the pilot was guilty of negligence, and the owners of the St. John liable for damage done by collision with a vessel belonging to the tow. He was negligent, although the accident may have been caused by an obstacle which had been recently and suddenly formed and could not be seen by him. A party cannot avail himself of the defense of "inevitable accident," who, by his own negligence, gets into a position which renders the accident inevitable.

The St. John, before reaching the tow, signaled that she intended to go to the east. No answer was made by those on the tow, though it had been grounded by its pilot making a mistake similar to that of the pilot of the St. John, and some of those in charge had sounded and discovered that the channel had changed. *Held*, that those managing the tow were not guilty of contributory negligence.

There was no legal duty on the part of the tow to either signal or impart any information as to the channel to the St. John. A steamer with full control of its machinery, desiring to pass a vessel, whether stationary or moving, must do it on its own responsibility, and is bound to select its route at its peril.

APPEAL from judgment of general term of supreme court in third judicial district affirming judgment for plaintiff on report of referee.

The steamer St. John, in making her second or third trip of the season upon the Hudson, during the year 1866, undertook to pass a tow of boats of plaintiff which were aground in the river. The true channel of the river, in which there was plenty of water and room to pass, was west of the grounded tow, but the pilot of the St. John, supposing it to be at the east, had attempted to pass on that side. The pilot in charge of the steamer taking the tow had mistaken the channel and had grounded by going too far east. Soundings had been made by one of this steamer's pilots after grounding and the place of the channel determined. The fact that the tow was aground was known to the pilot of the St. John.

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it being within sight of the steamer when lying at her dock at Albany.

The course of the St. John while attempting to pass on the east side of the tow was noticed in plaintiff's boats, but no attempt was made to direct her aright. The evidence shows that it was the custom for passing steam vessels while in motion to indicate that they would pass, by two blasts of the whistle, to the left, and that the St. John blew two blasts. These were not observed in the tow.

The St. John in the attempt to pass made a sudden sheer, ran into and sank one of plaintiff's boats. It was claimed by her pilot that the sheer was caused by striking a sand hummock recently formed and out of sight. This action was brought to recover damages for the cost of the boat sunk.

John H. Reynolds and *Wm. P. Prentice*, for appellants, cited *The Fashion*, 1 Newb. Ad. 8; *Kelsey v. Barney*, 12 N. Y. 425; *Brightley's Dig. Sup.* 313; *Steinback v. Rae*, 14 How. 532; *Dygert v. Bradley*, 8 Wend. 471; *Grace Girdler*, 7 Wall. 203; *Ann Caroline*, 2 id. 538; *Santa Claus*, Olc. 442; *Osprey*, Sprague, 245; *Pars. Mar. Law*, 202, note 3, and cases cited; *Barnes v. Cole*, 21 Wend. 185; *Nelson v. Leland*, 22 How. 55; *Rathbun v. Payne*, 19 Wend. 398; *Strout v. Foster*, 1 How. (U. S.) 89; *The Indiana*, 1 Abb. Adm. 330; *The Hypodame*, 6 Wall. 216; *Fero v. Buffalo and State Line R. R.*, 22 N. Y. 209; *Randolph v. The United States*, 1 Newb. 497; *The Narragansett*, Olc. 246; *Eliza and Abby*, 1 Betts' Dec. 435; *Buzzard v. Petrel*, 6 McLean, 491; *The Potomac*, 8 Wall. 590; *The Steamboat New Jersey*, Olc. 415; *Hane v. Anthracite*, U. S. Law Mag. Dec., 1850, "Europa;" *Guinon v. N. Y. and Harlem R. R. Co.*, 3 Rob. 25; *Baxter v. 2d Ave. R. R. Co.*, id. 511; *Grippen v. New York Cent. R. R.*, 40 N. Y. 34; *Baxter v. Troy and Boston R. R. Co.*, 41 id. 502.

Samuel Hand, for respondent, cited *Steamer Oregon v. Rocca*, 18 How. (U. S.) 570; *The Sciota*, Davies, 359; *U. S. v. The Mayor*, 5 Miss. 230; *The Clement*, 2 Curtis' C. C. 363; *Lockwood v. Lashell*, 19 Penn. 344; *R. B. Forbes*, Sprague, 328; *Dygert v. Bradley*, 8 Wend. 469; *The Rhode Island*, 1 Blatchf. 363; *U. S. Mail Steamship Co. v. Rumball*, 21 How. (U. S.) 372; *St. John v. Paine*, 10 id. 581; *Brown v. Linn*, 31 Penn. 510; *Crockett v. Newton*, 18 How. (U. S.) 581;

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Adams v. Higgins, 27 Miss. 95; *Wright v. Brown*, 4 Ind. 95; *Pierce v. Page*, 24 How. (U. S.) 228; *Louisiana v. Fisher*, 21 id. 1; *Holmes v. Watson*, 29 Penn. 457; *Cook v. Champlain Trans. Co.*, 1 Den. 91; *Teall v. Barton*, 40 Barb. 143; *Davies v. Mann*, 10 M. & W. 148; *Trow v. Vermont Central Railroad*, 24 Vt. 495; Lord CAMPBELL in *Dowell v. Steam Nav. Co.*, 5 Ell. & Bl. 206; *Haley v. Earle*, 30 N. Y. 208; HARRIS, J., 18 id. 256, 257; *Tuff v. Warman*, 5 C. B. (N. S.) 573; *Spafford v. Harlow*, 3 All. 176; *Fero v. Buffalo R. R.*, 22 N. Y. 209; *Morrison v. Steam Nav. Co.*, 20 Eng. L. & Eq. 455; *Cumming v. Spruance*, 4 Harr. 315; *McCready et al. v. Goldsmith et al.*, 18 How. (U. S.) 89.

CHURCH, C. J. The referee before whom this action was tried found, as a conclusion of fact, that the injury complained of was caused by the negligence of the defendant, and that the plaintiff was free from any negligence which contributed to the injury, and this court is concluded by these findings, unless they are unsupported by any evidence, or unless by undisputed evidence the contrary is established. As to the first proposition, that the injury was caused by the defendant's negligence, there was evidence fully justifying the conclusion of the referee. The officers and pilots of the *St. John* knew before she started from her dock that the plaintiff's tow was grounded and the position it occupied. Instead of pursuing the usual channel, as it had existed for several years, which would have enabled the steamer to pass the plaintiff's tow in safety, on the west side, without any examination to ascertain where the channel was, they directed her eastward, under the impression that a new channel had been formed, which would enable her to pass on the east side. While pursuing this course, she came in contact with some obstacle, which sheered her bow to the west far enough to point her directly toward the plaintiff's tow, and, then becoming unmanageable, she ran into and sunk the plaintiff's barge, *Buffalo*. These leading facts, with the surrounding circumstances detailed at the trial, presented a proper case for the judgment of the referee upon the question of the negligence of the defendant, and we have no power to review his decision. *Draper v. Stouvenel*, 38 N. Y. 219; *Fellows v. Northrop*, 39 id. 117; *Mason v. Lord*, 40 id. 476.

It is claimed, however, that the undisputed evidence shows that the accident was inevitable. This is based upon the idea that the

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St. John, in the pursuit of a lawful avocation, in a lawful manner, struck the bank, or some other obstacle, and that the highest degree of skill could not have prevented the sheering of the vessel, or the consequent collision. The answer to this position is, that the "sheering" was the immediate consequence of the defendant's negligence, as found by the referee, in running the steamboat out of the accustomed channel. A party cannot avail himself of this defense, who, by his own negligence, gets into a position which renders the accident inevitable. He must exercise care and foresight to prevent reaching a point from which he is unable to extricate himself. There was some evidence tending to show that the St. John came in contact with a "hummock" or sand bar, which had suddenly formed, was unknown to navigators, and which could not be guarded against, but the evidence on this point was not undisputed, and was far from being satisfactory, and the referee has not found that that fact existed. If it did not exist, and was undisputed, the negligence of the defendant in being at that point would prevent its availability in this action. *Crockett v. Newton*, 18 How. (U. S.) 581.

The authorities cited by the learned counsel for the defendant are not in conflict with these views. In the case of *The Grace Girdler*, 7 Wall. 203, the court say: "Inevitable accident is when a vessel is pursuing a lawful avocation, in a lawful manner, using the proper precautions against danger, and an accident occurs." It has been adjudged in this case, that the defendant's vessel was not using proper precautions against danger. So in the case of *fashion* (1 Newb. Ad. 8), an inevitable accident is held to be one "where no fault can be found on either side." The only point decided in *Kelsey v. Barnes*, 12 N. Y. 425, was that the highest possible care will not be exacted in such a case.

In *Steinbach v. Rae*, 14 How. (U. S.) 432, the court held the accident to be inevitable, because neither of the colliding vessels could see the other in time to prevent the accident.

It is also claimed by the defendant, that the negligence of the plaintiff contributed to the injury on two grounds: First, that the tow was in the wrong place, and had committed the same fault alleged against the defendant in endeavoring to sail east of the actual channel, and was guilty of negligence in running aground, which contributed to the injury. The tow was grounded several hours previous, and was entirely helpless at the time of the accident.

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Those in charge of the St. John had a full view of the tow, and knew her condition before leaving the dock at Albany, and all the way to where it lay, and the evening was clear and moonlight. The St. John, and all other passing vessels, were bound to regard the actual situation of the tow, and to exercise reasonable care to prevent injury. It is not pretended that the tow did any thing to affect the action of the St. John; it simply lay still; and it is no defense, that some hours previously she had grounded through carelessness. It cannot be said in such a case that the plaintiff's negligence contributed to the injury. The negligence must be *proximate* and not *remote*. It must be a negligence occurring at the time the accident happened. Notwithstanding the previous negligence of the plaintiff, if, at the time when the injury was committed, it might have been avoided by the defendant by the exercise of reasonable care and prudence, an action will lie for the injury. 28 N. Y. 256, per HARRIS, J., *Davies v. Mann*, 10 M. & W. 545; *Haley v. Earl*, 30 N. Y. 208; 24 Vt. 487; *Cummins v. Spruance*, 4 Harr. 315. The case of *Strout v. Foster*, 1 How. (U. S.) 89, is unlike this. There the injured vessel had voluntarily and unnecessarily anchored in the thoroughfare of one of the difficult passes, or outlets at the mouth of the Mississippi. The colliding vessel was a sailing vessel, and became unmanageable in consequence of the sudden failure of the wind, and floated by the tide and currents against the anchored vessel. The only evidence of negligence was the opinion of some experts, that the accident might have been avoided, if every thing had been done by the defendant which it was possible to do; in other words, that the highest possible degree of care and skill might have prevented the collision. The circuit judge held, that the law imposed no such *diligence* on the party in that case, and yet the judgment of the circuit court was only affirmed by an equal division of the judges of the supreme court. In principle, the case is similar to *Kelsey v. Barnes*, 12 N. Y. 425, and, if regarded as authority, is not antagonistic to the right of the plaintiff in this case.

It is also urged, that the tow was negligent in not warning the St. John of the danger of proceeding eastward by signal or otherwise. It seems that one of the men on the tow, while it lay aground, had made an examination and ascertained that the channel remained unchanged on the west side, and the omission to communicate this knowledge is also urged as an act of negligence.

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Signals are given to indicate the course of the vessel giving them. Passing steamers give one whistle if they intend to go to the right, and two, if to the left. If the St. John gave two whistles (about which there was some question on the trial) there was no usage or custom of navigation requiring any return signal from the tow, and any attempt to signal or give an alarm (if it had any effect) would have been as likely to produce confusion as to have benefited the steamer, while an effective interference on the part of the tow, in the sailing of the steamer, resulting in injury, might have cast the responsibility upon the plaintiff; and as to communicating the knowledge possessed by those in charge of the tow, it does not appear that it was practicable to do so. But we prefer to place the decision upon this part of the case upon the ground, that there was no legal duty on the part of the tow to either signal or impart any information as to the channel (which those in charge possessed) to the St. John. A steamer with the full control of machinery, desiring to pass a vessel, whether stationary or moving, must do so upon its own responsibility, and is bound to select its route at its peril. 1 Wall. 522, 146, 672; 18 How. 587, and cases there cited. The St. John had access to all the knowledge which the tow had, and, in addition, had several days' experience in sailing up and down that spring, which the latter had not. The principle that every person is bound to exercise reasonable care to protect his own property from injury does not apply to the omissions complained of. First, because the St. John knew the exact position of the tow, and it was unnecessary to give any information on that subject, and because the tow had no reason to suppose that the eastward course of the St. John would result in an injury to any of its boats. The St. John drew less water than the McDonald, and it may have been supposed that she could pass on the east side, and if not, that she would ground. In a case where a warning is necessary to prevent a collision, to inform an approaching vessel of the presence of a stationary one, which from darkness or other cause it could not discover, common prudence would dictate, and an ordinary care demand, that the warning should be given, if practicable. But it would be a dangerous rule, and lead to the greatest injustice, to hold a party liable for a mere omission to give information in a case like the one before us.

The statement and directions of the general agent of the defendant received in evidence could have done no legal injury to the de-

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fendant on the trial, if inadmissible, restricted as they were to the question of damages, as there was no dispute on the trial as to the amount of damages.

The judgment must be affirmed.

Judgment affirmed

SHELDON v. HORTON, appellant.

(43 N. Y. 92.)

Bills and notes — waiver of demand and notice by indorser.

The defendant, who had indorsed a note, was, previous to its maturity, shown the note and told that the maker wanted it to remain another year. He was asked if he was willing, and he said he was willing to let it remain, and that it was a good note. *Held*, that this was a waiver of demand and notice; that the liability of the indorser became absolute on the maturity of the note, and no subsequent demand or notice was required.

APPEAL from judgment of general term of supreme court in second district, affirming a judgment for plaintiff upon the verdict of a jury against indorser upon a promissory note. The facts appear sufficiently in the opinion.

Homer A. Nelson, for appellant.

Allard Anthony, for respondent.

ANDREWS, J. It may be assumed that the statement made by the defendant to the witness Henry Sheldon, which is relied upon as constituting a waiver of demand and notice, was communicated to the plaintiff at the time he received the transfer of the note, and that the defendant understood that such communication was to be made.

The interview between the witness and the defendant took place a few days before the maturity of the note, and pending a negotiation between the witness and the plaintiff for the purchase by the plaintiff of the note and other property. It was sought by the witness, at

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the suggestion of the scrivener who drew the agreement for the sale, and in charge of the court, the statement of the defendant at the interview was, without objection, treated as having been made to the plaintiff.

There was a direct contradiction between the testimony of the witness Henry Sheldon and that of the defendant as to what was said between them at the interview referred to.

This question was submitted as a question of fact to the jury, and the issue was found for the plaintiff, and the version of the witness Sheldon is therefore to be regarded as the true one. This brings us to the question in the case, viz.: Whether the conversation between the witness and the defendant, as related by Henry Sheldon, was, in law, a waiver by the defendant of the demand and notice, and rendered the defendant liable to pay the note, although no demand was made or notice given. The court charged the affirmative of this proposition.

The witness testified that, at the interview, he showed the note to the defendant, and told him that the maker "wanted it to remain another year." The witness continued: "I asked him if he was willing, and he said he was willing to let it remain. He looked it over, and said it was a good note."

There is no express evidence in the case of any agreement between the holder and the maker of the note for the extension of the time of payment. If such an agreement was made, the fact is to be inferred from the statement of the witness at the interview with the defendant, and the omission to collect the note at its maturity.

The liability of an indorser of a note to pay it is, in general, upon the implied condition that payment thereof shall be demanded of the maker at maturity, and in case of default, that notice of non-payment shall thereupon be given to the indorser.

These conditions are for the benefit and protection of the indorser. The demand is to be made, so that the principal debtor, may be first called upon to pay the debt, and notice of non-payment, in case of default, is to be given, so that the indorser may have prompt notice, and the opportunity to protect himself from loss.

But the rule that demand and notice are requisite to charge the indorser is subject to exceptions, as when the note was made for the accommodation of the indorser, or when he has before its maturity taken an assignment of all the property of the maker for his protection. Story on Prom. Notes, §§ 268, 282. In such cases the

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reason of the rule requiring demand and notice does not apply, and the indorser is liable without them. So an indorser may waive these proceedings, and consent to be bound, although they are not taken.

This is upon the obvious principle, that a party to a contract may renounce the benefit of any stipulation in it, designed for his own protection. Such waiver may be by express words, or it may arise by implication from the acts or conduct of the indorser.

It may precede the maturity of the note, or may arise upon a promise to pay the note with knowledge of the *laches* afterward.

The right that demand should be made and notice given is personal to the indorser, and the waiver requires no new consideration to support it. Para. on Notes & Bills, 404, 574; Story on Notes, § 275; *Tebbetts v. Pearce*, 23 Wend. 379; *Coddington v. Davis*, 3 Den. 17; *Wall v. Bay*, 1 La. An. 312; *Barclay v. Weaver*, 19 Penn. St. 398; *Law v. Stewart*, 20 Me. 98.

In this case, the assent of the indorser that the note should "lie over" another year, when applied to by the holder, and when informed by him the maker of the note desired it, was inconsistent with the idea of the continuance of the obligation of the holder to demand payment of the maker, or to give notice of non-payment, in order to hold the indorser.

In case the payment of the note was extended, there was manifestly no propriety in making demand of payment at maturity, for, by the arrangement of the parties, the time of payment was postponed, nor would notice of non-payment be proper, for the maker, under the new arrangement, would not then be in default.

There seems to be no construction of the transaction consistent with the view, that, when the consent was given, the defendant intended to make his liability to pay the note depend upon demand and notice at its maturity.

It is, we think, a fair inference from the evidence, that the time of payment was extended by an agreement between the holder and the maker of the note. But the consent of the defendant was not upon condition that such agreement should be made.

The question to the indorser whether he was willing to allow the note to lay another year did not imply that the holder was to enter into any positive engagement with the maker for such extension. The consent was full and unconditional, and justified the plaintiff in omitting proceedings to fix, by demand and notice, the liability of the indorser, so long as the consent was not withdrawn.

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The holder, in fact, allowed the note to mature, without demand or notice, and deferred its collection for the time suggested.

It is claimed by the appellant that, after the alleged consent to the extension of time, the plaintiff deposited the note, before it became due, in a bank for collection, and he so stated on his cross-examination. No place of payment was specified in the note, and on his re-examination the plaintiff testified that he left the note at the bank, with other papers, for safe keeping.

This evidence could be legitimately considered upon the controverted question, whether the defendant consented to the extension of the time of payment, but it did not tend to qualify or explain the effect or meaning of the language used by him when the consent was given. *Boyd v. Cleveland*, 4 Pick. 525.

We are of opinion that, under the circumstances, the consent proved was, in law, a waiver of demand and notice, and that there was no error in the charge of the court. *Creamer v. Perry*, 17 Peck. 333; *Spencer v. Hervey*, 17 Wend. 489.

The liability of the indorser became absolute on the maturity of the note, and no subsequent demand or notice at any time was required. *Amoskeag Bank v. Moore*, 37 N. H. 539; *Ridgeway v. Day*, 13 Penn. St. 208; *Forster v. Jurdison*, 16 East, 104.

The point now made for the first time, that the complaint was insufficient, cannot be considered. The question of waiver was litigated on the trial without objection as to the form of the pleadings.

The judgment should be affirmed.

ALLEN, GROVER, PECKHAM and RAPALLO, JJ., concurred with ANDREWS, J., for affirmance.

CHURCH, Ch. J., and FOLGER, J., were for reversal, holding that the conversation, as sworn by Henry Sheldon, constituted no sufficient waiver.

Steinweg v. Erie Railway.

STEINWEG V. ERIE RAILWAY, appellant.

(43 N. Y. 122.)

Common carrier — stipulation against liability for loss — negligence.

The plaintiff shipped goods over the defendant's railroad. By a clause in the bill of lading, the defendant was released from liability "from damage or loss to any article from or by fire or explosion of any kind." The goods were destroyed while on one of defendant's trains, by fire, which caught from a spark from the engine of the train. *Held*, that the defendants were not, by the stipulation in the bill of lading, released from liability for loss arising from its own negligence.

It was the duty of the defendant to provide safe and proper machinery for working its road, and it was negligent if the engine hauling the goods was, in its construction and appliances, lacking in any thing which sound rules required it should have.

If there was known and in practical use an apparatus, which, if applied to an engine, would prevent the emission of sparks, the defendant was negligent if it did not avail itself of such appliance. But it was not bound to use every possible prevention which scientific skill might have suggested, nor to adopt an untried machine.

There must not only exist scientific skill to make, but there must have been in practical use, and known, locomotives consuming their own sparks, before a railway company can be charged with negligence in not employing them.

APPEAL from judgment of general term of New York common pleas affirming judgment in favor of plaintiff upon a verdict of a jury.

Action for goods lost by common carrier.

The assignor of plaintiff shipped two cases of goods by the Erie railway. At the time of shipment he received from the company's agent a bill of lading which contained a stipulation that, in consideration of the shipper paying a price for transportation below the local rate, he released the company from liability for loss or damage to any article from or by fire or explosion of any kind.

The goods were burned while being carried in a train on the Erie railway, the fire having been set by sparks from the locomotive hauling the train. It was proved at the trial, by the plaintiff, "that there were appliances in regard to locomotives by which they consume their own smoke and sparks, and prevent their setting fire to property."

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The defendant refused to pay the loss, on the ground that it was exempted from liability by the stipulation in the bill of lading.

S. Newell, for appellant, cited *Alexander v. Green*, 7 Hill, 533; *Wells v. Steam Nav. Co.*, 4 Seld. 375; *Wells v. N. Y. C. R. R. Co.*, 24 N. Y. 181; *Perkins v. N. Y. C. R. R. Co.*, id. 196; *Bissell v. N. Y. C. R. R. Co.*, 25 id. 442; *Lee v. Marsh*, 43 Barb. 102; *Stedman v. West. Trans. Co.*, 48 Barb. 97.

William Henry Arnoux, for respondent, cited *Bissell v. N. Y. C. R. R. Co.*, 25 N. Y. 445; *Hegeman v. Western R. R.*, 13 id. 9; *Grill v. Genl. Iron Screw Co.*, L. R., 3 C. P. 476; *Czech v. Genl. Steam Nav. Co.*, id. 14; *Lemo v. Dudgeon*, id. 17, note; *York Co. v. Cent. R. R.*, 3 Wall. 107; *Cole v. Goodwin*, 19 Wend. 251; *Gould v. Hill*, 2 Hill, 623; *Leszinsky v. N. J. C. R. R.*, unreported, G. T. S. C., 1st dist.; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 382; *Schieffelin v. Harvey*, 6 Johns. 180; *Alexander v. Greene*, 7 Hill, 533, 547; *Dorr v. N. J. Steam Nav. Co.*, 11 N. Y. 485; *Wells v. Steam Nav. Co.*, 8 id. 375; *Wells v. N. Y. C. R. R.*, 24 id. 181; *Phillips v. Clark*, 26 L. J., C. B. 168; 2 C. B. N. S. 156; *Pen. and Orient. Steam Nav. Co. v. Shand*, 11 Jur. 771; *Lloyd v. Genl. Iron Screw Co.*, 33 L. J., Ex.; 5 H. L. C. 284; *Martin v. Great Indian R. L. R.*, 3 Ex. 9; *Peck v. North Staffordshire R. R.*, 32 L. J., Q. B. 241.

FOLGER, J. The conceded facts in the case sustain the finding of the jury, that the goods in transit on the appellant's cars, while in appellant's charge, were destroyed by fire kindled by sparks from the engine while in motion. The court below was warranted in instructing the jury that the bill of lading received from the appellant by the assignor of the respondent formed a special contract between them. The appellant remained, however, subject to all the common-law liability of a common carrier, save so far as it was exempted therefrom by the effect of such special contract. *Dorr v. N. J. Nav. Co.*, 1 Kern. 485; *Bissell v. N. Y. C. R. R.*, 25 N. Y. 445. And though by it the appellant was in terms released from damage or loss to the goods from or by fire, it was not relieved from liability for damages resulting by fire from its own negligence. *York Co. v. C. R. R.*, 3 Wall. 107-113.

The appellant, being a corporation, was obliged to act through

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natural persons; and their negligence is its negligence, when they are its agents, so as to be identical with itself. Its board of directors or managing agents, in respect to its external relations, must be considered as so far identical with the corporation as to throw upon it the liability for their negligence. *Perkins v. N. Y. C. R. R.*, 24 N. Y. 213, 214.

And as upon the directors or managing agents rested the duty of providing fitting machinery for the safe and proper working of the road, it was their negligence, and hence the appellant's negligence, if this engine used by it in hauling these goods was, in its construction and appliances, lacking in any thing which sound rules required it should have. *Sager v. P. S. and P. and E. R. R. Co.*, 31 Me. 228.

And here arises the principal question in this case. The rule of law is, that the appellant was guilty of negligence, if it adopted not the most approved modes of construction and machinery in known use in the business, and the best precautions in known practical use for securing safety. If there was known and in use any apparatus which, applied to an engine, would enable it to consume its own sparks, and thus prevent the emission of them, to the consequent ignition of combustible property in the appellant's charge, it was negligent if it did not avail itself of such apparatus. But it was not bound to use every possible prevention which the highest scientific skill might have suggested, nor to adopt an untried machine or mode of construction. 2 Redf. on Railways (3d ed.), 189, ch. 24, § 1, p. 176; *Ford v. London and Southwest R. R. Co.*, 2 Fost. and Finl. (Nisi Prius) 730; *Hegeman v. Western R. R.*, 3 Kern. 9; *Field v. N. Y. C. R. R.*, 32 N. Y. 339.

And it was a question for the jury whether there did in fact such negligence exist. 32 N. Y., above cited, 346-350; 3 Kern., above cited, 26.

The testimony on this point, as shown to us in the papers, was meager. One witness only was called for the appellant, and he testified that it was not possible to run a locomotive without having sparks escape from it, and that there was no known method of constructing locomotives to prevent sparks escaping and setting fire to property. One witness only was called for the respondent, and he testified that there were appliances in regard to locomotives by which they consume their own smoke and sparks, and prevent their setting fire to property. But there was no testimony that such

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appliances were in practical use, or that the existence of them was known to practical men, nor was any evidence given that the appellant did not have upon the engine the appliances of which the respondent's witness spoke.

The court below charged the jury that the special contract did not absolve the appellant from liability, unless the destruction of the goods was caused by an accident over which the appellant had no control. This meant that though the cause of the fire which consumed the goods was accidental (if that can be said to be accidental, the cause of which may be controlled), yet, if the appellant had control over the cause, it was not relieved from liability. And this was correct; for, if it had control over the cause, and did not exercise that control, that was its negligence, and for its negligence it was liable.

The court below, proceeding in the charge to the jury, called their attention particularly to the testimony of the two witnesses above alluded to, and instructed the jury that, if they should decide that a locomotive can be so constructed as to prevent the emission of sparks, and thereby secure combustible matter from ignition, and that the appellant neglected to so construct its engines, it was the duty of the jury to find for the respondent, because there was a duty on the appellant to use every precaution and adopt all contrivances known to science to protect the goods intrusted to it for transportation. This instruction does not accord with the rule above laid down.

There must exist, not only the scientific power to make locomotives which will consume their own smoke and sparks, but such locomotives must have been made by skill and put into practical use, and the use have become known, before a railway company can be charged with negligence in not putting them on to its road.

In *Ford v. London and So. West Railway Co.*, 2 Fost. & Finl. (Nisi Prius) 730, ERLE, Ch. J., charged the jury that the company was bound to take reasonable care and to use the best precautions in known practical use for securing safety, and that it was sufficient if it used every precaution in known practical use.

In *Hegeman v. The Western R. R.*, 3 Kern. 9, the court charged the jury in substance that although a defect was latent, yet, if it could be ascertained by a known test, the defendant was responsible. On the authority of that case, it is for the jury to decide whether the adoption of any improvement in the construction of machinery is

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not incumbent upon a railway company. But it is for the jury so to decide upon evidence, not alone that science has invented and constructed it, but that it has been put in use and practically tested and become known. The charge to the jury in the court below was incorrect in this particular. It did not lay upon the jury the duty of finding from the testimony whether there were in known practical use, at the time of the destruction of the goods, such appliances for locomotives as would enable them to consume their own smoke and sparks. From the charge, the jury were authorized to find for the respondent, if there were such contrivances known to science. It might be that scientific men — theorists — knew of them, and that theory had taken shape in actual construction; and still practical men have never put them into such use and so established their capabilities, as that they ought to have become known to the appellant. In the absence of such experimental use and testing, the appellant was not to be held guilty of negligence in not adopting them. The charge in this respect might have misled the jury.

The counsel for the appellant requested the court to charge the jury that the appellant was not liable if the goods were destroyed by fire without fraud on its part, or unless they should find it guilty of fraud or culpable negligence amounting to fraud. The court did not err in refusing so to charge. The appellant was liable if there was negligence on its part, without regard to any supposed distinctions or degrees of negligence. But a compliance with the request would have been an instruction to the jury by the court that there are degrees of negligence, for one only of which the appellant was liable. Such instruction would have been erroneous. But for the error above pointed out the judgment of the general term should be reversed and a new trial ordered, with costs to abide the event.

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ATCHESON, appellant, v. MALLON.

(43 N. Y. 147.)

Contract against public policy.

By a statute of the State the board of auditors of the town of O. were authorized to receive sealed proposals for the collection of town taxes, and to award such collection to the person offering the most favorable terms. The plaintiff and defendant both made proposals. At the time of doing so they made an agreement, that if either obtained the award he would share the profits equally with the other. The defendant obtained the award and made certain profits. *Held*, that the agreement was contrary to public policy, and the plaintiff was not entitled to recover the stipulated share of the profits.

APPEAL from order of general term of supreme court in fourth judicial district, reversing judgment on verdict in favor of plaintiff and granting new trial.

Action to recover a share of the profits realized from the collection of taxes in the town of Oswegatchie, St. Lawrence county.

By an act of the legislature (Laws of 1866, chap. 127) the board of town auditors of the above-named town were authorized to receive proposals under seal for the collection of town taxes and to award such collection to the person offering the most favorable terms. The board having advertised the plaintiff and defendant each made proposals. Each saw the proposal of the other before it was sent in, and at the time of sending in they agreed, that if either received the award they should share equally in the profits and losses arising from the collection. The defendant received the award and realized a profit—to recover the agreed share of which this action was brought.

Samuel Hand, for appellant.

Nathaniel C. Moak, for respondent.

FOLGER, J. It is not necessary, for the determination of this case, to inquire whether the effect of the agreement between the parties was in fact detrimental to the town of Oswegatchie. The true inquiry is, is it the natural tendency of such an agreement to injuriously influence the public interests? The rule is, that agreements which, in their necessary operation upon the action of the

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parties to them, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public, or of third parties, are against the principles of sound public policy, and are void. *Gulick v. Bailey*, 5 Halst. 87; *Mills v. Mills*, 40 N. Y. 545, 546. The object of the act of 1866 is plain. It was to reduce to the tax payers of the town of Oswegatchie the expense of the collection of taxes upon them, either directly, by securing the collection at a lower rate of compensation therefor, or indirectly, by the payment into the town treasury of a bonus in money, for the privilege of serving as collector. The object and policy of the statute was to be achieved, only by exciting the rivalry and competition of men seeking this privilege. This competition was to be excited by calling by advertisement for sealed and secret proposals. Each bidder, ignorant of what his rival was about to offer, would be under stimulus to make a bid at the best rate to the town, which his judgment would sanction, as to profit to himself. Whatever made known to one bidder the views and proposals of another abated his stimulus, and tended to weaken rivalry and deaden competition. And when an agreement was made between bidders, to share in the acceptance of the offer of either, it is apparent that the competition must materially slacken. Each of these parties had intended to make a proposal on his own account, and it was after each knew of the other's intention that the agreement between them was proposed and entered into. Until it can be truthfully said that men's actions will not be affected by a consideration of their self-interest, it cannot be maintained that the parties to this agreement were likely, after it was formed, to be as strong competitors as they were before. Such is the natural effect of agreements of this nature; and it is for this reason, and not on account of the actual results upon the public or upon third persons, of particular contracts, that they are held void. It is because men with these agreements in their hands, and relying upon them for their gain, do not act toward the public and third persons as they would without them, under the stimulus of competing opposition. If Mallon had promised Atcheson a sum of money if he would refrain from making any proposal, and Atcheson, relying upon it, had made none, and then had sought to enforce the agreement, there can be no doubt that the law would have held the promise void. And why? Not out of any consideration for the parties to it, but because its effect was to remove Atcheson from the number of earnest

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bidders, and thus by lessening competition to detriment the public. And the agreement which was made, laying open to Mallon, just what was the judgment of Atcheson of a profitable bid, and removing in effect an interested rival, tended to affect Mallon's action. While Atcheson, confident that if Mallon succeeded it was also his own success, lost the impulse to a real competition with him. It seems beyond cavil that the agreement is obnoxious to the rule above stated, and such agreements courts refuse to enforce.

Perhaps there is nothing in the statute which would have prevented the parties making an avowedly joint proposal. Though the language of its second, third, and fourth sections, and the analogy of the laws for the collection of taxes, contemplate but one person as town collector. But a joint proposal, the result of honest co-operation, though it might prevent the rivalry of the parties, and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. They are public and avowed, and not secret. The risk as well as the profit is joint and openly assumed. The public may obtain at least the benefit of the joint responsibility, and of the joint ability to do the service. The public agents know, then, all that there is in the transaction, and can more justly estimate the motives of the bidders and weigh the merits of the bid.

The order of the general term should be affirmed, with the costs to the respondent.

Order affirmed and judgment final for the defendant.

ROBERTS, appellant, v. FISHER.

(43 N. Y. 159.)

Mutual mistake — payment in note of insolvent third person.

The defendants who were indebted to the plaintiffs tendered the note of third parties, which was accepted in payment of the indebtedness. At the time of such acceptance the makers of the note were insolvent, but both plaintiff and defendant were ignorant of the fact. *Held*, no payment and that plaintiff was entitled to recover the amount of indebtedness for which the note had been given.

APPEAL from judgment of general term of the supreme court in first judicial district, affirming judgment for defendants at circuit.

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Action for balance of account for goods, wares and merchandise. The defendants were in the habit of purchasing merchandise of the plaintiff under an agreement that plaintiff should accept in payment notes of third persons, and it was usual for defendant to pay in such notes as the plaintiffs were willing, after inquiry as to the solvency of the maker, to accept. On the 13th of April the defendants offered the note of Homer, Rice & Co., which was accepted and transferred to plaintiff on the 17th. Homer, Rice & Co. suspended payment on the 15th, which circumstance, however, was unknown to either one of the parties. This action was brought to recover the amount of the note of Rice & Co.

N. B. Hoxie, for appellant, cited *Owenson v. Morse*, 7 D. & E. 64; *Lightbody v. Ontario Bank*, 11 Wend. 15; S. C., 13 id. 100; *Tobey v. Barker*, 5 Johns. 58, 72; *Muldoon v. Witlock*, 1 Cow. 290, 303; *Crane v. McDonald*, 45 Barb. 354; *Higby v. N. Y. & H. R. R. Co.*, 3 Bosw. 497, 504; *Weadon v. Olds*, 20 Wend. 174; *Leger v. Bonaffe*, 2 Barb. 474; *Baldwin v. Van Deusen*, 37 N. Y. 487; *Roget v. Merritt*, 2 Caines, 117; *Benedict v. Field*, 16 N. Y. 595.

Samuel Hand, for respondent, cited *St. John v. Purdy*, 1 Sandf. S. C. 9; *Conkling v. King*, 10 N. Y. 440; *Graves v. Friend*, 5 Sandf. S. C. 568; *Powell v. Jones*, 42 Barb. 27.

PECKHAM, J. The sole question presented to the jury and decided by them was, whether the note of Rice & Co. was delivered and received, so far as it went, in payment of plaintiff's account. The jury decided it was, and so found for defendant. The learned justice, in his charge, suggested that the jury might look at the course of business, at the arrangement between the parties to receive, on account of plaintiffs' demands, notes of defendants' customers, to aid them in deciding whether this note was received in payment.

The verdict of the jury establishes the fact, that this note was received by the plaintiffs in payment of a precedent debt. It establishes nothing more. At the time it was so received, the makers had already stopped payment, utterly failed, and nothing whatever was ever realized from them upon the note.

Under such circumstances who must sustain the loss? Upon whom does the law cast it?

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This loss, be it observed, had already occurred when the note was received. The agreement to take it, made on the 13th, at most, operated merely as an accord with no satisfaction. 2 Barb. 475. Until the 17th there was no satisfaction. In fact, so far as the case shows, there was no binding obligation, either to deliver or to receive that particular note until it was delivered on the 17th. Until then either party could have refused to deliver or to receive that note; and confessedly, the account was not paid. The question here then is as first stated: who must sustain this loss, the note being received in payment on the 17th?

Upon broad principles of justice, it would seem that a man should not be allowed to pay a debt with worthless paper, though both parties supposed it to be good.

Here when this loss occurred, the note was the property of the defendants. Why should they not bear their own loss? They seek to pay a debt they honestly owe with that loss, with that worthless paper. Assuming the integrity of both parties, it seems equitable and just that defendants should sustain the loss that occurred while they were bearing the risk, while the note was yet at the risk of no one else.

If A. sell to B. a horse on a farm, and gets his pay by note, the horse being considered as delivered there, and it turns out, contrary to the expectation of both, that the horse was accidentally killed on the day before the sale, it would scarcely be pretended that A. could recover upon the note; yet it is difficult to distinguish the cases in principle.

We think this is healthful morality as well as good law. In most cases the possessor of the note is presumed to know more about its value and the condition of the parties to it than a stranger.

Generally, we should suppose that a merchant would know more about the responsibility of his own customers than another living in another State. This rule will prevent sharp traders from imposing upon the unwary as well as save owners of worthless notes from temptation.

We do not intend to say that the parties could not have agreed that this note should be received in payment whether the makers had failed or not, or even if they had failed. But that is not this case.

The parties made this contract in ignorance of a material controlling fact, viz., the insolvency of Rice & Co. Had that been

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known to the plaintiffs, it is quite clear they would not have accepted this note; the contract would not have been made.

Had it been known to the defendants (as the proof shows it was not), the transfer of the note would have been a fraud upon the plaintiffs, and would have avoided the contract. Both being ignorant of such a fact the plaintiff is allowed to rescind the contract in the courts of this State.

These principles seem to be sustained broadly in the language of the court, and the cases are quite analogous to this.

In *Marble v. Hatfield*, 2 Johns. 455, it was held that a payment, for cattle sold, of a forged bank note, with other good ones, was to that extent no payment, and the vendor might treat it as a nullity and recover for his cattle.

KENT, then chief justice (after citing a case from Esp. Cases, 3, much like this as to payment and insolvency, and where it was held to be no payment), remarked that "whether it be the promissory note of an individual or of a corporation can make no difference."

In *Lightbody v. Ontario Bank*, 11 Wend. 11, a payment had been made in the bills of a bank which had stopped payment, though in good credit when the payment was made, and both parties ignorant of the failure. *Held*, no payment. This case was afterward unanimously affirmed in the court of errors. 13 Wend. 101. See *Leger v. Bonaffe*, 2 Barb. 475, where a party purchased bills of exchange on a foreign house which had then failed, unknown to the parties here, and paid for them in notes of third persons. *Held*, that the purchaser might rescind the purchase, as founded in mutual mistake, and that he could reclaim his notes.

In *Baldwin v. Van Deusen*, 37 N. Y. 487, defendant sold a note of one Onley, as genuine, who, it was subsequently ascertained, was an infant, a mutual mistake. *Held*, that this gave the right of rescission to the plaintiff "upon the discovery of the mistake."

The judgment should be reversed and a new trial granted, costs to abide the event.

Judgment reversed and new trial granted.

WOODS *et al.*, appellants, v. WILDER *et al.*

(43 N. Y. 104.)

Contract made with public enemy — when void.

The defendants at the breaking out of the rebellion of 1861 were copartners doing business at Savannah, Ga., where one of them, named Wheaton, resided. Two of the defendants did business as copartners in New York, where they resided. On the 23d of August, 1861, the plaintiff's agent purchased of the Savannah firm a bill of exchange. It was drawn by Wheaton in the name of his firm on the New York firm of defendants. By an act of congress passed July 18, 1861, the president was authorized to declare certain districts in insurrection, and that thereupon all commercial intercourse should cease and become unlawful. On the 16th of August, 1861, the president by proclamation declared the district in which Savannah is situated in a state of insurrection. *Held*, that the drawing of the bill of exchange was illegal and void, and within the rule prohibiting contracts with the enemy during war and no action could lie against any of the parties to it.

The copartnership between Wheaton and the other defendants was dissolved by the war, and the defendants were not bound by the contract of Wheaton made after such dissolution.

APPEAL from judgment of general term of supreme court in first judicial district directing judgment for defendants.

The defendants, Wilder, Beers and Wheaton, were, at the breaking out of the rebellion in 1861, copartners, doing business in the city of Savannah, Ga., under the firm name of Wilder, Wheaton & Co. The defendants Wilder and Beers also carried on business at that time in the city of New York as copartners under the firm name of Jonathan Beers & Co. The defendants Wilder and Beers resided in New York and the defendant Wheaton in Savannah.

On the 13th of July, 1861, an act of congress was passed authorizing the president of the United States to declare certain districts in the south in insurrection, and provided that thereupon all commercial intercourse with the inhabitants of such districts should cease and be unlawful. On the 16th of August, the president by proclamation declared certain territory, within which the city of Savannah was situated, to be in a state of insurrection.

On the 23d of August, 1861, the agent of the plaintiff purchased at Savannah from Wheaton a bill of exchange for \$5,000. It was

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drawn by Wheaton in the firm name of Wilder, Wheaton & Co., which firm still existed unless dissolved by the war, upon the firm of Jonathan Beers & Co., in New York. The bill was presented to the New York firm for acceptance, but they refused to accept or pay it. It was protested and this action brought against the defendants as drawers.

Ira D. Warren, for appellant, cited *Shortridge v. Mason*, 2 Am. Law Reg. 95; Bur. Law Dic., part 1, 235; Wor. Dic. 273, "Com.;" also 12 U. S. Stat. at large, 1-262; 1 Kent's Com. 57; Story on Cont. § 497; Collyer on Part. 97, note 4, and § 784; *Bristol v. Sprague*, 8 Wend. 424; *Wardell v. Haight*, 2 Barb. 549; *Ketchum v. Clark*, 6 Johns. 144; *Davis v. Allen*, 3 Comst. 168; *Clapp v. Rogers*, 12 N. Y. 283; 2 Camp. 44.

Robert D. Benedict, for respondents, cited *Swinerton v. The Columbian Ins. Co.*, 37 N. Y. 174; *Prize Cases*, 2 Black, 667; *Taylor v. Barclay*, 2 Sim. 391; 1 Chitty's Pleading, 196; *White v. Burnley*, 20 How. (U. S.) 249; 6 T. R. 723; 2 B. & P. 374; 1 id. 272; 3 id. 35; 3 Ves. 612; *Craig v. Missouri*, 4 Pet. 410; 1 Brod. & Bing. 447; 2 T. R. 610; 2 B. & P. 130; *Kennett v. Chambers*, 14 How. 88; *Bank of U. S. v. Owens*, 2 Pet. 527; *Scholefield v. Eichelberger*, 7 id. 586; also 2 Wall. 419; *Prize Cases*, 2 Black, 667; id. 670; *Mrs. Alexander's Cotton*, 2 Wall. 419; *Prize Cases*, 2 Black, 635; *Jackson Ins. Co. v. Steward*, 6 Am. Law Reg. (N. S.) 732; *The Emulus*, 1 Gall. 594; *The Hiawatha*, Blatch. P. C. 1; *The Mary Clinton*, id. 356; *The Rapid*, 8 Cranch, 135; *The Hoop*, 1 Rob. 165; *The U. S. v. Grossmayer*, 9 Wall. 74; *Griswold v. Waddington*, 16 Johns. 438; Story on Cont. § 54; *Willison v. Patterson*, 7 Taunt. 439; *Brandon v. Nesbitt*, 6 Term. 23; Wheat. Int. Law, 36; *Kluber Droit des Gens*, § 240; *The Wm. Bogaldy*, 5 Wall. 407; *Bilgery v. Branch*, 17 Am. Law Reg. 336.

RAPALLO, J. The historical events and the acts of the national executive, in connection with the hostile relations between the government and the rebel States, which had transpired prior to the act of congress of July 13, 1861, are detailed in the opinion of the court in the case of *Swinerton v. The Columbian Ins. Co.*, 37 N. Y. 174, and it is not necessary to repeat them here.

The question whether these events and acts established a state of

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war between the government and the sections in rebellion was determined in the *Prize Cases*, 2 Black, 635, and it was there held that a state of civil war existed as early as the date of the first capture involved in that case, which was May 17, 1861. That the proclamation of April 15th, calling out the militia, and the proclamation of blockade of April 27th and 30th, were conclusive evidence of such war. That such war affected the rights of the two sections of our country in the same manner as if it were being carried on by two contending nations. That it gave to the United States government the same rights of blockade and capture in respect to the enemy and neutrals as they might exercise in case of a foreign war, and that all persons residing in the rebel districts were to be treated as enemies of the nation.

From this decision NELSON, J., and three of his associates dissented, holding that before the insurrection could be dealt with on the footing of a war, it must be recognized or declared by congress, the only war-making power of the government, and that no power short of that could change the legal status of the government, or the relations of its citizens, from that of peace to a state of war. But they conceded that the act of July 13, 1861, did recognize a state of civil war between the government and the States described in the proclamation of August 16th, and made it territorial. 2 Black, 689.

There can be no question, therefore, that war, with all its incidents and effects upon intercourse and contracts between the inhabitants of the territories of the respective belligerents, prevailed on the 23d of August, 1861, when the bill of exchange in question was drawn, and that the courts are bound to take notice of that fact.

All commercial intercourse with the inhabitants of the enemy's territory is, during war, unlawful. By the proclamation of August 16th, it was specially interdicted. This interdiction of intercourse involves, according to well-settled rules, a prohibition against every species of private contract with the subject or citizen of the enemy. Wheat. Int. Law, § 317; 1 Kent's Com. 67; Story on Cont., § 608; *White v. Bromley*, 2 How. 249; *Scholesfield v. Eichelberger*, 7 Pet. 586; *U. S. v. Grossmeyer*, 9 Wall. 75. In the case of *Mrs. Alexander's cotton*, 2 Wall. 404, it was determined that all persons residing in rebel territory must be regarded as enemies, except so far as distinctions are expressly made by the government. CATRON, J., in pronouncing the decision of the court in the case, states, that the

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court cannot inquire into the personal character and dispositions of individual inhabitants of enemy territory, but must be governed by the principle of public law so often announced as applicable alike to civil and international wars, that all the people of each State or district in insurrection against the United States must be regarded as enemies.

It is therefore unnecessary to consider the question of the individual disposition of Wheaton; he was a citizen of Georgia and resided within the district embraced in the proclamation.

The rule prohibiting contracts with the enemy during war is applicable to the drawing and negotiating of bills of exchange between subjects of the powers at war. Wheat. Int. Law, § 317; Story on Cont. (4th ed.), § 608; *Willison v. Patterson and others*, 7 Taunt. 439. Chancellor KENT (1 Kent's Com. 67) states that the drawing of a bill of exchange by an alien enemy on a subject of the adverse country is an illegal and void contract, because it is a communication and contract with the enemy.

Some exceptions to this rule are stated, in the books, to be allowed by reason of the necessity of the case. These are bills drawn for ransom, and bills drawn by a citizen in the enemy's country on his own country, to provide him with necessary means of subsistence. The case of *U. S. v. Barker*, referred to by the appellant's counsel in 1 Paine's C. C. 166, is difficult to reconcile with the authorities; but even that case contains special circumstances not existing in the present case. The bill, in that case, was drawn here by a citizen of the United States against funds which he had in England, and was indorsed to the United States government, and prosecuted in its name and behalf.

The argument, that the effect of drawing the bill in the present case was to remove the plaintiff's funds from Georgia to New York; and that, therefore, the contract was not within the spirit of the prohibition, cannot be maintained. Even if the transaction had the effect claimed, yet, if not licensed by our government, it would come within the general prohibition. Nations at war adhere to these interdictions for reasons of general policy, although in special cases they may recoil upon themselves. In the *Prize Cases*, one item of the property in dispute was restored to the complainant, not merely on the ground that it was the property of a loyal citizen which he was attempting to withdraw from the enemy's country; but, on the additional ground, that an order of the secretary of the navy per-

mitted such withdrawal. But in the case of the *U. S. v. Grossmayer*, 9 Wall. 75, G., a creditor in New York, directed E., his debtor in Georgia, to invest the amount of the debt in cotton and hold it for him, which was done. The cotton was stored in Georgia as the property of G., and was seized by the United States, and the proceeds were claimed by G. under the captured and abandoned property act of 1863. But the court held, that, as G. was prohibited during the war from having any dealings with his debtor, it followed that nothing which either or both of them did could have the effect to vest in G. the title to the cotton in question. The reasons for making an exception in that case were much stronger than in this. There, the cotton was withdrawn from the use of the enemy, and locked up in store for the benefit of the northern creditor; but in the present case the dealings did not, in fact, effect any change in the position of the fund, which was advantageous to our government; it merely transferred its custody from the bank to Wheaton, and gave him the full power of disposal over it.

The draft being illegal and void, no action could lie against any of the parties to it; but there are other reasons applicable to the defendants, Wilder and Beers, which clearly exonerate them.

All commercial partnerships, existing between subjects of the two parties prior to the war, are dissolved by the mere act and force of the war itself. Story on Cont. (4th ed.), § 609; 1 Kent's Com. 67; *Griswold v. Waddington*, 16 Johns. 438; and this consequence was held to ensue from the civil war of 1861. *The William Bagaley*, 5 Wall. 377, 407. Wilder and Beers, therefore, were not bound by the contract of Wheaton made after such dissolution.

The appellant seeks to charge them, however, under an alleged verbal agreement claimed to have been made by them on the 2d of August, 1861. They allege that there was proof in the case that on that day Wilder and Beers agreed that, if the appellants would buy the drafts of Wheaton, they would pay them without presentation, on evidence that they had been drawn; and they claim that this question not having been submitted to the jury, there was a mistrial. The evidence as to the agreement is very slight and indefinite, and the making of the agreement is positively denied by the defendants. But there are other grounds which are controlling as to this branch of the case. Aside from the objection which might be raised, that the agreement should have been in writing (1 R. S. 768; 9 N. Y. 435; 5 Duer, 583), the further objection is

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insuperable, that the act which the plaintiff was to do, to entitle him to performance on the part of the defendants, became illegal before any thing was done in pursuance of the supposed agreement. It may well be that on the 2d of August, in view of the terms of the act of July 13, 1861, the purchase of a bill of exchange from an enemy would not have been unlawful; for, although a war then existed, the result of which would be to render commercial intercourse with the enemy unlawful, without the permission of our government, yet the government was competent to give such permission, and the act of July 13th may be construed as permitting such intercourse to continue until the president should make his proclamation. The terms of the act are, that the president may declare certain districts in insurrection, and that *thereupon* all commercial intercourse, etc., *shall cease* and be unlawful, etc. This language implies a permission that such intercourse should continue until the proclamation should be made, and the good faith of the government would be pledged to give effect to this implied permission. But after the 2d of August, and before the bill was drawn, the proclamation of August 16th was made, and that proclamation clearly prohibited the transaction contemplated by the supposed agreement of August 2d and rendered it unlawful.

There is no ground upon which this action can be sustained, and the court below, therefore, rightly rendered judgment for the defendant on the verdict.

The judgment should be affirmed, with costs.

Judgment affirmed.

Smith v. Miller.

SMITH V. MILLER, appellant

(43 N. Y. 171.)

Payment by draft—bank check—laches of holder.

The defendants, a firm in Buffalo, who were indebted to the plaintiff's firm in New York, forwarded by mail a draft on J. K. P. & Co., a business house in New York. The plaintiff, about half-past one on the day of its receipt, presented the draft to J. K. P. & Co., and received that firm's check for the amount. J. K. P. had funds in the bank on which the check was issued and the check would have been paid if it had been presented that day. The check was deposited by plaintiff in their own bank, and it did not reach the other bank until twelve o'clock the next day, and after J. K. P. & Co. had failed. *Held*, that the plaintiffs were guilty of laches in failing to present the check on the day it was received, and the defendants were released from liability for their indebtedness.

APPEAL from judgment of general term of superior court of New York, affirming judgment for plaintiff.

Action to recover balance of account for goods, etc.

The defendants, a firm doing business in Buffalo, were indebted to the plaintiff who did business in New York city. In payment defendants sent by mail a draft for the amount on the house of James K. Place & Co., of New York city. The draft was received by the plaintiffs on the morning of November 19th, and was, at about half-past one, on the afternoon of that day, presented to the drawees who paid the same with their own check. Plaintiffs received the check and deposited it in the bank with which they did business. It did not reach the bank on which it was drawn until twelve o'clock the next day, when payment was refused.

At the time when Place & Co. gave the check they were supposed to be solvent, and had on deposit in the bank a sufficient sum to meet the check. The check would have been paid, if it had been presented at any time during the day on which it was given. On the next morning, Place & Co. failed, in consequence of which payment of the check was refused.

Joseph H. Choate, for appellant.

Eldridge T. Gerry, for respondent.

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ALLEN, J. The bill of the defendants on J. K. Place & Co. was not received by the plaintiffs in absolute payment of their claim, and the debt due from the defendant was not discharged by the delivery of the draft. It was received in payment *sub modo*, and could become operative as a payment in fact only when paid by the drawees. *Hall v. Barber*, 13 N. Y. 566; *Bradford v. Fox*, 38 id. 289; Story on Bills, § 419.

The check of J. K. Place & Co., the drawees of the bill to the order of the plaintiffs, in the absence of an express agreement that the same should be received as payment, was not a payment of the bill; and as the check was dishonored when presented for payment, there has been no actual satisfaction of the debt due the plaintiffs from the defendants. It was the duty of the plaintiffs, however, if they intended to hold the defendants either as drawees of the bill, or for their prior indebtedness, to present the bill for payment within the time prescribed by law for that purpose, and if not paid, to notify the defendants of its dishonor. Had that been done, the remedy of the plaintiffs against the defendants would have been very clear. They would have been remitted to all their rights for the recovery of their original claim as if no bill had been drawn. It was under such circumstances that the plaintiff was held entitled to recover in *Turner v. Bank of Fox Lake*, 3 Keyes, 425. That action was upon a bill of exchange given to take up a like bill before then drawn and duly presented and protested for non-payment. In that case as in this, the check of the drawee of the first bill had been received, but, on payment being refused by the bank, it had been returned and the bill reclaimed and properly protested for non-payment, and notice given to the drawer, and all in due time from the receipt of the bill by the plaintiffs. The bill sued upon was adjudged to have been given upon a sufficient consideration.

Although the plaintiffs may not have realized the money upon the bill or their check, and their debt remains unpaid, it does not follow that the defendants continue liable.

A creditor may so deal with negotiable securities received from his creditor for collection, and to be placed to his credit when paid, as to discharge the debtor from all liability whether the securities are in fact paid or not. He may make them his own so as to substitute the parties to the securities his debtors, in place of his original debtor, by his dealings with those parties; as by giving

time for payment, or by any other act prejudicial to the interests of the debtor. *Southwick v. Sax*, 9 Wend. 22; *Vernon v. Brown*, 2 Shaw, 296. The same result will follow any neglect or laches of the creditor in obtaining payment of negotiable instruments transferred from which loss and injury ensues.

By receiving the securities, and assuming the collection, or as here, receiving the bill, and consenting to present the same for payment, he undertakes to do all that the law requires to be done to obtain payment, and if he fails in the performance of that duty the debtor is discharged. *Canndye v. Allenby*, 6 B. & C. 373; Story on Bills, § 109. Laches, which would discharge the drawer or indorser of a bill of exchange, will as effectually extinguish the debt, for payment of which a bill or other negotiable instrument is transferred. Story on Bills, *supra*, and note; id. § 419 and note. This was decided in *Kobbe v. Clark*, Selden's Notes, October, 1853, p. 11. If by the acts or omission of the creditor, thus receiving negotiable instruments for collection, a loss occurs, it should fall upon him who is the cause of the loss, rather than upon the distant and innocent debtor. *Bradford v. Fox*, *supra*. The defendants residing at Buffalo, being indebted to the plaintiffs doing business in New York, and having funds with J. K. Place & Co. in the latter city, drew their bill on the latter firm to the order of the plaintiffs to be presented for payment, and when paid to be applied in payment of the indebtedness. The plaintiffs, instead of insisting upon the money, received the check of Place & Co. upon one of the banks in the same city. There was no impropriety in the receipt of the check, and as the drawees were entitled to the draft upon payment of it, there is nothing in the case upon which fault could be imputed to the plaintiffs in the surrender of the draft on receipt of the check. *Russell v. Hawkey*, 6 T. R. 12; *Howard v. Robinson*, 7 B. & C. 90; Byles on Bills, 16; Story on Bills, § 419; Chitty on Bills (ed. of 1833), 433, 434. If the check was worthless when given, or became worthless before it could have been with reasonable diligence presented for payment, the loss would have fallen upon the defendants, and they would not have been discharged from their liability, unless the plaintiffs had omitted to notify them in due time of the non-payment of the bill. There would, in such case, be no loss resulting from negligence.

But a check is payable instantly; and as between the drawer and drawee, the latter has, in analogy to the rules applicable to inland

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bills of exchange, until the day after the receipt of a check to present it for payment, when drawn on a bank in the same place where given and received. *Smith v. James*, 20 Wend. 192; *Harker v. Anderson*, 21 id. 372; *Ward v. Evans*, 2 Ld. Raym. 928. But the duty of the plaintiffs to the defendant is not determined by that rule of commercial law. That rule has respect only to the contract, and liability of the parties to the instrument.

When a check is taken instead of money, by one acting for others, as was done by the plaintiffs, a delay of presentment for a day, or for any time beyond that within which, with proper and reasonable diligence, it can be presented, is at the peril of the party thus retaining the check and postponing presentment, as between him and the persons in interest, whom he represents. If a custom can exist in law, and does exist in fact, authorizing such delay at the risk of the absent principal, it must be shown; it cannot be presumed to exist without evidence.

The undisputed evidence in this case shows a practice, if not inconsistent with the existence of any such custom, at least more in harmony with the relative rights and obligations of the parties as recognized by law; and which, had it been adopted by the plaintiffs, would have prevented all loss. The proof is that the account of the drawers of the check was good at the bank during all the business hours of the day on which it was drawn; that the amount to their credit, and subject to their draft, was more than sufficient to pay all outstanding checks; and if this check had been presented, it would have been paid or certified as good, which would have been equivalent to payment. The plaintiffs had two full hours for presenting the check.

Two checks, drawn later in the day, one for \$11,000 and one for \$9,500, were presented at the bank and certified before three o'clock of that day and subsequently paid. The same diligence by the plaintiffs, as was exercised by the holders of those checks, would have obtained the money. This practice of "certifying checks" by the banks is equivalent to an acceptance binding the banks to payment, and is recognized and sanctioned by the law. The certificate is regarded as an acceptance in writing within the statute. 1 R. S. 722; Byles on Bills, 15; *Mead v. Mechanics' Bank of Albany*, 25 N. Y. 143. It was the duty of the plaintiffs to present the check at the bank, at least during the day on which they received it, and obtain either the money or a certificate, or cause the same to be protested

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for non-payment; and not having done so, they were chargeable with negligence and the consequent loss. By their delay and neglect, unless some evidence in explanation or excuse can be given, they made the check their own and the defendants were discharged.

The judgment should be reversed, and a new trial granted, costs to abide the event.

Judgment reversed and new trial granted

BURRELL, appellant, v. BOARDMAN.

(43 N. Y. 254.)

Will — executory devise to corporation — perpetuities.

The testator, by a clause in his will, gave the residue of his personal estate to certain trustees named, and directed that it should be applied to support a hospital which was to be under such trustees' management. He also directed the trustees to apply to the legislature for an act to incorporate the hospital, and if the legislature should not, within two years after his death (provided the youngest trustee living at testator's decease, and testator's nephew, who was also named in the will, or either should so long live), grant a proper act of incorporation, the bequest was to be paid to the United States. *Held*, that the reasonable interpretation of the will is that the testator intended to limit a contingent future interest in the nature of an executory devise, the contingency depending upon the creation of a corporation by the legislature taking within the period allowed for the suspension of the ownership of property by the statute against perpetuities.

An executory bequest limited to the use of a corporation to be created within the period allowed for the vesting of future estates and interests is valid. Such a bequest does not violate the statute of wills which prohibits devises to a corporation not expressly authorized to take by will.

APPEAL from judgment of general term of supreme court of first judicial district, affirming judgment of special term dismissing the complaint.

Action to procure the annulling of a bequest as illegal and void.

The facts appear sufficiently in the opinion. The testator died November 30, 1863, leaving an heir at law, who died January 20 1864. The plaintiff is the executor of the heir at law.

The legislature of the State passed an act on the 2d of February,

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1864, incorporating a hospital, which was accepted by the trustees as being in compliance with the terms of the testator's will.

George F. Comstock, for appellant.

John M. Mason, Chas. O'Connor and Theodore W. Dwight, for defendants except the United States.

Noah Davis, for the United States.

CHURCH, C. J. This action was brought by the plaintiff, as executor of the will of James C. Roosevelt Brown, against the defendant, Julia M. Boardman, executrix of the will of James H. Roosevelt, deceased, and others, for the purpose of having the residuary bequest in the will of the latter providing for founding and maintaining a hospital declared void, and claiming that the plaintiff, as executor of Brown, who was the heir at law of the testator, Roosevelt, is entitled to all sums thus attempted to be bequeathed, and to the whole of the residuary estate.

The solution of the questions presented involves the construction and validity of those provisions of the will of Mr. Roosevelt which provide for the founding and permanent endowment of a hospital; and it is important, in the first place, to ascertain the intent and meaning of the provisions in question.

The testator gave the residue of his personal estate, including lapsed legacies, etc., in trust to the successive presidents of five "certain incorporations," naming them, and to four private individuals, naming them, "and to the survivor and survivors of them for the establishment in the city of New York of an hospital for the reception and relief of sick and diseased persons, and for its permanent endowment." He then directed that the institution should be managed by the nine trustees thus appointed, and in case of any vacancy in the individual trustees it should be filled by the official trustees. After some further directions about the management of the funds, the will contains the following clauses:

"I direct my trustees promptly to apply to the legislature of this State for proper acts to incorporate, secure and perpetuate said hospital. And should such legislature for two years next after my decease (provided the youngest of my said individual trustees living at my decease, and my said nephew, or either of them, shall so long

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live) refuse or neglect to grant a liberal charter for the safe organization, conduct and perpetuity of such hospital establishment in accordance with the provisions of my will, I, in that event, direct my trustees from time to time to pay over the above bequests that may come into their possession under my will to the government of the United States of America," etc.

Taking these several clauses together, it is quite manifest that the unincorporated trustees could not administer the charity, and had no duty imposed upon them with reference to the fund except to pay it over to the ulterior legatee, if the legislature failed to grant the charter. It is true the residuary estate was given to them for the establishment and endowment of a hospital; but they could only accomplish this according to the terms of the will, by and through a corporation to be thereafter created, which it was made their duty promptly to apply for.

Such is the general scope of the will. The purpose is first declared, and then the means of accomplishing it are prescribed, and to render his intent more certain, the testator declared that, if the charter was not granted within a specified period, the bequest should go in another direction.

This provision repels any implication even in favor of the right of the private trustees to administer the fund for the benefit of the charity, or to do any act with reference to it, except to apply for a charter. If, therefore, the limitation to the incorporated hospital is valid as a contingent executory bequest, it is not material to inquire into the competency of the unincorporated trustees to take the legal title for the temporary purpose indicated. Neither their appointment nor their title was essential to the validity of the contingent limitation. The law would compel the application of the property to the purposes of the lawful bequest, wherever it should be found.

It is urged that there is no bequest to the contemplated corporation, and no direction to pay the fund to it. The testator declares in the residuary clause his purpose to be the establishment of a hospital and *its permanent endowment*. The condition of the endowment is, that the legislature shall pass proper acts "to incorporate, secure and perpetuate said hospital," that is, the hospital specified in the residuary clause which provides for its endowment. The next paragraph directs the manner of investing the funds of the "incorporation" thus provided. Nothing can be more certain than that the testator designed that the title to the funds or property in the

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possession of the trustees or elsewhere, which was included in the residuary clause, should vest in the corporation immediately upon its creation, and a requirement for a formal payment or delivery was doubtless deemed unnecessary because the trustees of the testator were to be also trustees and managers of the corporation.

Nor can it be claimed that this is a present bequest to a corporation not *in esse*. When it appears from the will that the donee is to come into being in future, or to become qualified to take upon the happening of some future event, a present bequest will not be presumed, nor unless "there is not the least circumstance from which to collect the testator's intention of any thing else than an immediate devise to take effect *in presenti*." *Fearne on Remainders*, 536. Here, every circumstance concurs in giving the bequest an executory character. An application was to be made to the legislature, after the testator's death, for a charter. If obtained, the bequest would take effect; if not, it would go to the ulterior donee.

The reasonable interpretation of the will is, that the testator intended to limit a contingent future interest in the nature of an executory devise, the contingency depending upon the creation of a corporation by the legislature, capable of taking within the period allowed for the suspension of ownership of property by the statute against perpetuities.

The language might have been more explicit; but avoiding technical criticisms, and observing the rule to find a lawful instead of an unlawful intent, and considering all the provisions of the will, the construction indicated seems the most natural and accurate.

It is objected that the provisions in question violate the statute against perpetuities. By this statute, the title to personal property must vest absolutely within two lives in being. A possibility of suspension beyond that for any time, however short, is fatal. *Schettler v. Smith*, 41 N. Y. 328. It is urged that such suspension is possible, because the legislature might pass the charter on the last day of the existence of the last of the two lives; that it would not become operative until accepted by the trustees, and that such acceptance would take time, during which the title could not vest.

From the language employed, that testator must have intended that the charter would be obtained and become operative within the two lives. The trustees were to apply for acts to incorporate, secure and perpetuate the hospital, and the legislature was to grant a charter for its safe organization, conduct and perpetuity within the

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specified period. This language implies that the testator intended a complete corporate existence. Besides, the charter to be granted could only be the one applied for, in which case no formal acceptance is necessary. *Angell & Ames on Corporations*, 69.

It is also claimed that the bequest to the corporation does not depend upon obtaining the charter within the two lives, and that this condition is applicable only to the limitation to the United States; and if that is invalid, and the charter was afterward obtained, it might be accepted and the corporation take the bequest. This construction is too technical. When the testator declared that, if the legislature neglected for the specified period to grant the charter, the bequest to the United States should take effect, he, in substance and legal implication, declared that the corporation should not take after that period. If the former is invalid, the title would then vest immediately in the next of kin. A void provision is operative to indicate the intent of the testator. *Van Kleeck v. Dutch Church*, 20 Wend. 457.

The material legal question remains to be considered, viz.: Whether an executory bequest limited to the use of a corporation, to be created within the period allowed for the vesting of future estates and interests, is valid?

I am not aware that this precise question has ever been judicially determined in this State. In the cases of *Leonard v. Burr*, 18 N. Y. 108, *Phelps v. Pond*, 23 id. 77, and *Bascom v. Albertson*, 24 id. 59, the statute against perpetuities was violated, and in *Owens v. The Missionary Society, etc.*, 14 id. 380, and in *Downing v. Marshall*, the bequests were to unincorporated societies, incapable of taking the title. In such cases, a subsequent incorporation would not vitalize a bequest which was void at the time it was made. But two cases have been cited in favor of the validity of such a limitation. The first is the case of *Attorney-General v. Downing*, Wilmot's Opns., p. 16, where lands were devised to purchase a piece of ground and erect a college, and the will contained a direction to obtain a charter.

Lord Chief Justice WILMOT held such an executory devise good upon the same principle as a devise for the benefit of an unborn child. He says: "So, in this case, the testator does not only declare his intention to give to a person, not *in esse*, but is actually giving directions for the creation of that person; and there is no difference between the cases, but that one is an executory trust for a natural

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person to be created, and the other is a political person to be created."

It is claimed that the court in this case held the devise good, independent of the provision for obtaining a charter, which is probably true; but the individual opinion of Chief Justice WILMOT upon the point is, nevertheless, entitled to respectful consideration.

The other case cited is that of *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99, which was decided by a divided court, and the precise ground upon which the will was sustained is not very clear; but the opinion of THOMPSON, J., upon this question, is entitled to some weight as an authority.

No authority or *dictum* has been cited against the validity of such a bequest.

As an original question, I am unable to discover any valid objection to such a bequest, nor why it does not stand upon the same principle as a future limitation for the use of an unborn child. In the latter case a natural being is to come into existence; the other, an artificial being.

I have carefully examined the objections urged in the very able argument of the learned counsel for the appellant, and I am unable to give to them my assent. They are based mainly upon the uncertainty of the "supposed corporate donee." It is said that there is not the same certainty of description as in the case of an unborn child, who is usually described as the son of A. B., and the like; that the validity of the bequest must rest on the description itself, and cannot wait for comparison; that the power of the legislature to create corporations is unlimited, and that many such could be created, each one of which would answer, or might be claimed to answer, the general requirements of the will. It is not admitted that the same precise degree of certainty in the character and description of the donee is indispensable to the application of the same principle; but a conclusive answer to the position is suggested by the objection itself. We must look at the donee from the standpoint of the testator's death, and from that point the description is as certain as is the power of the legislature to create the precise corporation described. If the power existed to create the specified artificial being, that, and no other, must be regarded as the one designated by the testator. It is no answer to say that the legislature could create two just alike, or even that it could create several, which might claim to come within the description. These are em-

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barrassments which would afterward arise, and which ought not to be anticipated in determining this question. It is not to be supposed that the legislature would pass more than one charter, or any other than the one applied for, or one different than that described. The most that can be said is, that a possibility of uncertainty existed, and this can be said of any donee, or of any contingent event. If the corporation applied for and granted should not be liberal and in accordance with the provisions of the will, the ulterior donee or next of kin could challenge its right to take the bequest. It would then become a judicial question. *Hull v. Hull*, 24 N. Y. 651; *Grant v. Raymond*, 6 Pet. 242.

But these are questions of comparison, and do not affect the certainty of description viewed at the testator's death. If the corporation described would be a violation of the constitution of the State or of the United States, or for any other reason it could be seen that it could not be created, the question would be quite different, but it is not sufficient to say that it might not, or that a different one might be created. The contingency upon which the limitation depended was possible, and was to be accomplished by lawful means and was not too remote.

It is also objected that this bequest in effect violates the statute of wills, which prohibits devises to a corporation not expressly authorized to take by will. This objection is untenable because there is no bequest to such a corporation, and no bequest *in presenti* at all. Before the bequest could take effect, the corporation must be created, and authorized to take and hold the property in perpetuity. I can see no legal objection to the adoption of the principle involved in this case in view of all its legitimate consequences. A limitation contingent upon the competent exercise of legislative power, within the period of the lawful suspension of the ownership of property, cannot be said to be unlawful, although the contemplated action of the legislature may not be in accordance with any existing law. It is not for the court to determine whether such contingent limitations ought to be permitted. Our duty is performed in determining that there is no restriction upon such testamentary dispositions. My conclusion is, that the executory bequest in his will, for founding and maintaining a hospital, is valid.

This conclusion renders it unnecessary to pass upon the effect of the will and conveyance of the plaintiff's testator, James C. Roosevelt Brown. Nor is the validity of the ulterior bequest to the

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United States necessarily involved. Assuming that the United States government may take property in this way for its general purposes, or for any of its specified constitutional purposes, I should hesitate about sanctioning a gift so controlled by advisory or precatory words, as to require, or, as a matter of implied duty demand, the extension of its power and patronage within this State, over subjects foreign to its legitimate functions; but as this limitation can never take effect, it is not requisite definitely to decide the question. Nor is it proper to decide the question, whether the peculiar system of *charitable uses*, as it existed in England, has or ever had in any of its features any foothold in this State. The able and exhaustive arguments delivered by the learned counsel for the respective parties upon this question were very instructive, and will be of great service to the court, if an occasion shall ever demand its determination.

The judgment of the supreme court must be affirmed.

Judgment affirmed.

BLOSSOM v. DODD, appellant.

(43 N. Y. 201.)

Common carrier — stipulation in receipts by.

The plaintiff, a passenger in a railway car, delivered to the messenger of a baggage express two checks for two packages of baggage which the messenger agreed to transport from the railway terminus to another point, and deliver to plaintiff. At the time of taking the checks, the messenger entered their numbers on a printed form, purporting to be a receipt containing certain stipulations limiting the company's liability and handed it to the plaintiff. The car was dark, so that it would have been impossible to read the stipulations, and plaintiff did not read them. The stipulations were in small print, but a direction to read this receipt was in conspicuous print. *Held*, that the plaintiff was not presumed to know the contents of the receipt, or to assent to them.

Checks for baggage are not of the character of bills of lading, and, like instruments, and persons receiving them, are not presumed to know that they contain the terms upon which the property is carried.

APPEAL from order of general term of supreme court in second judicial district, setting aside judgment upon report of referee and granting new trial.

Blanton v. Dodd.

Action to recover value of lost baggage.

The plaintiff was a passenger on the New Jersey Central Railroad on the 17th of October, 1866, traveling toward New York. Before reaching Jersey City, a messenger of Dodd's express, a baggage express company, doing business in the city of New York, and of which defendant is president, passed through the train upon which plaintiff was, asking and receiving baggage-checks of passengers and agreeing to deliver the baggage in such parts of New York as they should direct. The plaintiff was asked if he had any baggage to be delivered, and he thereupon handed the messenger two checks and received a printed slip with blank places in which the numbers of his checks were written with a lead pencil. With the exception of a large advertisement at the top, the printed parts of the slip were as follows:

N. J. R. R. DEPOT, PIER 12, N. Y. }	
No. 946 BROADWAY, N. Y. }	
DODD'S EXPRESS.	
Articles or Checks numbered as below.	FOR DODD'S EXPRESS.
<p>RECEIVED OF M.</p> <p>It is mutually agreed, and is part of the consideration of the contract, that DODD'S EXPRESS shall not be liable for merchandise or jewelry contained in baggage, nor for loss by fire, nor for an amount exceeding ONE HUNDRED DOLLARS upon any article unless specially agreed for in writing on the receipt and the extra risk paid therefor, nor for baggage to railroad, steamboat or steamship lines after the same has been left at the usual place of delivery to such lines, and the owner hereby agrees that Dodd's express shall be liable only as above; and it is further agreed that said express shall not be liable for loss or damage unless the claim therefor be made in writing at their principal office, with this receipt annexed, within thirty days thereafter.</p> <p style="text-align: right;">DO NOT READ THIS RECEIPT. 53</p>	

At the time of plaintiff's receiving the slip it was eleven o'clock at night, and the cars were so dark that the print could not be read.

One of the parcels of baggage represented by the checks were delivered. The other, worth \$260, was lost while in the hands of the express company. This action was brought for its value, and the defendant set up the stipulation in the receipt as a limitation upon his liability. The referee found for the plaintiff, awarding him the full value of the lost baggage.

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Amasa J. Parker, for appellant.

Samuel Hand, for respondent.

CHURCH, C. J. The common-law liability of common carriers cannot be limited by a notice, even though such notice be brought to the knowledge of the persons whose property they carry. *Dorr v. N. J. Steam Nav. Co.*, 1 Kern. 485. But such liability may be limited by express contract. *Id.*; *Bissell v. N. Y. Cent. R. R. Co.*, 25 N. Y. 442; *French v. Buffalo, N. Y. & Erie R. R. Co.*, 4 Keyes, 108.

The principal question in this case is, whether there was a contract made between the parties limiting the liability of the defendants to a loss of \$100 for the valise and its contents, which the plaintiff intrusted to their care. A *fac simile* of the card upon which the alleged contract was printed has been furnished in the papers. It does not appear, on examination, like a contract, and would not, from its general appearance, be taken for any thing more than a token or check denoting the numbers of the checks received, to be used for identification upon the delivery of the baggage. The larger portion of the printed matter is an advertisement, in large type. The alleged contract is printed in very small type, and is illegible in the night by the ordinary lights in a railroad car, and is not at all attractive, while other parts of the paper are quite so.

Considerable stress is laid upon the fact that the words, "Read this receipt," were printed on the card in legible type. The receipt reads: "Received of M—— articles or checks numbered as below, 368-319." "For Dodd's Express." The blank is not filled, nor is the receipt signed by any one. The invitation is not to read the contract, but the receipt. In order to read it, the paper must be turned sideways; and no one, thus reading the receipt, would suspect that it had any connection with the alleged contract, which is printed in different and very small type across the bottom of the paper. It is no part of the receipt, is not connected with it, and is not referred to in any other part of the paper. The defendants are dealing with all classes of community; and public policy, as well as established principles, demand that the utmost fairness should be observed.

This paper is subject to the criticism made by Lord ELLENBOROUGH, in *Butler v. Heane*, 2 Camp. 415, in which he said, that "it called attention to every thing that was attractive, and concealed

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what was calculated to repel customers ;” and added : “ If a common carrier is to be allowed to limit his liability, he must take care that any one who deals with him is fully informed of the limits to which he confines it.” Nor did the nature of the business necessarily convey the idea of a contract to the traveler in such a manner as to raise the presumption that he knew it was a contract, expressive of the terms upon which the property was carried, or limiting the liability of the carrier. Baggage is usually identified by means of checks or tokens. And such a card does not necessarily import any thing else. At all events, to have the effect claimed, the limitation should be as conspicuous and legible as other portions of the paper. In *Brown v. E. R. R. Co.*, 11 Cush. 97, where the limitation was printed upon the back of a passenger ticket, the court says: “ The party receiving it might well suppose that it was a mere check, signifying that the party had paid his passage to the place indicated on the ticket.” In the cases of *Prentice v. Decker*, 49 Barb. 21, and *Limburger v. Westcott*, id. 283, limitations were claimed upon the delivery of similar cards of another express company, and the court held, in both cases, that such delivery did not charge the persons receiving them with knowledge that they contained contracts. A different construction was put upon the delivery of a similar card, in *Hopkins v. Westcott*, 6 Blatchf. 64; but I infer that the learned judge who delivered the opinion intended to decide that something short of an express contract will suffice to screen the carrier from his common-law liability, and that a notice, personally served, which could be read, would have that effect. The attention of the court does not seem to have been directed to the distinction between such a notice and a contract. The delivery and acceptance of a paper containing the contract may be binding, though not read, provided the business is of such a nature and the delivery is under such circumstances as to raise the presumption that the person receiving it knows that it is a contract, containing the terms and conditions upon which the property is received to be carried. In such a case it is presumed that the person assents to the terms, whatever they may be. This is the utmost extent to which the rule can be carried, without abandoning the principle that a contract is indispensable. The recent case of *Grace v. Adams*, 100 Mass. 560, relied upon by the defendant’s counsel, was decided upon this principle. The plaintiff delivered a package of money to an express company, and took a receipt containing a provision exempting the company from lia-

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bility for loss by fire; and the court held that he knew that the paper contained the conditions upon which the money was to be carried, and was, therefore, presumed to have assented to them, although he did not read the paper. The court says: "It is not claimed that he did not know, when he took it, that it was a shipping contract, or bill of lading." So, in *Van Goll v. The S. E. R. Co.*, 104 Eng. C. L. 75, the same principle was decided. WILLES, J., said: "Assuming that the plaintiff did not read the terms of the condition, it is evident she knew they were there." KEATING, J., said: "It was incumbent on the company to show that such was the contract." * * "I think there was evidence that the plaintiff assented to those terms."

As to bills of lading and other commercial instruments of like character, it has been held that persons receiving them are presumed to know, from their uniform character and the nature of the business, that they contain the terms upon which the property is to be carried. But checks for baggage are not of that character, nor is such a card as was delivered in this instance. It was, at least, equivocal in its character. In such a case a person is not presumed to know its contents, or to assent to them.

The circumstances under which the paper was received repel the idea of a contract. No such intimation was made to the plaintiff. He did not, and could not, if he had tried, read it in his seat. It is found that he might have read it at the end of the car, or by the lights on the pier or in the ferry-boat; and it is claimed that he should have done so, and, if dissatisfied, should have expressed his dissent. If he had done so, and, in the bustle and confusion incident to such occasions, could have found the messenger and demanded his baggage, the latter might have claimed, upon the theory of this defense, that the contract was completed at the delivery of the paper, and that he had a right to perform it and receive the compensation.

It is impossible to maintain this defense without violating established legal principles in relation to contracts. It was suggested on the argument, that the stipulation to charge according to the value of the property is just and proper. This may be true; but the traveler should have something to say about it. The contract cannot be made by one party. If the traveler is informed of the charges graduated by value, he can have a voice in the bargain; but, in this case, he had none. While the carrier should be pro-

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tected in his legal right to limit his responsibility, the public should also be protected against imposition and fraud. The carrier must deal with the public upon terms of equality; and, if he desires to limit his liability, he must secure the assent of those with whom he transacts business.

My conclusion is, that no contract was proved:

1. Because it was obscurely printed.

2. Because the nature of the transaction was not such as necessarily charged the plaintiff with knowledge that the paper contained the contract.

3. Because the circumstances attending the delivery of the card repel the idea that the plaintiff had such knowledge, or assented in fact to the terms of the alleged contract.

The order granting a new trial must be affirmed, and judgment absolute ordered for the plaintiff, with costs.

All the judges concurring, upon the ground that no contract limiting the liability of defendants was proved.

Order affirmed, and judgment absolute for the plaintiff ordered.

WOODWORTH, appellant, v. BENNETT.

(43 N. Y. 372.)

Illegal contracts.

The plaintiff, defendant, and two other parties, one of whom was an engineer in the employment of the State, upon the canals, entered into an agreement in the nature of a copartnership, to put in a bid for certain canal work. This agreement was forbidden by statute. The bid was put in, but before it was awarded, one H., who was a higher bidder for the same work, purchased the bid for \$400, giving his note therefor. It was afterward arranged that the plaintiff should collect the note, and that each of the parties interested should receive \$100 of the proceeds. Defendant was not paid. *Held*, that the original agreement of partnership being illegal the defendant could not enforce any of its unexecuted provisions, one of which was to divide the \$400. That the express agreement made for the collection of the note and the division of the money will not be enforced, it being only a promise to carry out the unexecuted provisions of the contract of partnership.

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APPEAL from judgment of general term of supreme court in fifth judicial district, affirming judgment of special term allowing a counterclaim to defendant of \$100.

The facts appear in the opinion.

G. F. Bicknell, for appellant.

Charles Mason, for respondent.

CHURCH, C. J. The point in this case is, whether the court below erred in allowing to the defendant the sum of \$100 as an offset. The facts are substantially as follows: The plaintiff, defendant, Stephens and Truesdell, made an agreement in the nature of a copartnership, to propose or bid for public work on the Seneca river improvement. The bid was to be put in the name of the plaintiff alone, the defendant and Stephens to become sureties. Truesdell was at the time an engineer in the employ of the State on the canals. The bid was made in the name of the plaintiff, in accordance with the arrangement. Before the work was awarded, the said parties made an agreement with one Haroun, to withdraw their claim to the work, and sell their bid to him for \$400 (he being a higher bidder for the same work), which was consummated, and he gave his note for the amount. It was then arranged that the note should be left with the plaintiff for collection, and that when collected each of said persons should be entitled to \$100. The plaintiff collected the note, paid to Stephens and Truesdell each \$100, and promised to pay the defendant, and apply it on their deal, but never did. It is claimed that it cannot be allowed, on account of the illegality of the transaction out of which it arose. To enable the court to apply correct legal principles, it is necessary to analyze the transaction and ascertain its true nature and character.

The original arrangement for a joint interest or copartnership was illegal, and contrary to a positive statute in two respects. The laws of 1854, chapter 329, in substance requires, that every proposal for work shall contain the names of all persons who are interested, and prohibits any secret agreement or understanding, that any person not named shall become interested in any contract that may be made, and engineers, and all other persons in the employ of the State on the canals, are also prohibited from becoming interested in any contract or job on the public works.

In the next place, the transaction with Haroun was contrary to public policy, and illegal. It is manifest that the object and purpose of purchase of the bid was to have it withdrawn so as to enable Haroun to take the contract upon a higher bid. This was directly against the interests of the State, and tended to destroy that honest competition which public bidding is designed to secure; and when, as in this case, it was done partly for the benefit of an officer of the State, whose duty it was to protect its interests, it was not only contrary to public policy, but was grossly corrupt.

The supreme court placed its decision in favor of the defendant, upon the ground that, as between these parties, the illegal contract had been fully executed when Haroun paid the money, and that the plaintiff then became a mere depository, and held the money for the use of the other parties.

It is undoubtedly true that, if the contract or obligation does not depend upon nor require the enforcement of the unexecuted provisions of the illegal contract, it will be carried out. It has been laid down as a test, that whether a demand connected with an illegal transaction is capable of being enforced at law depends upon whether the party requires any aid from the illegal transaction to establish the case. *Chitty on Cont.* 657. So it has been settled that a party who pays money to a third person for the use of another, which, on account of the illegality of the transaction, he was not obliged to pay, such third person cannot interpose the defense of illegality. *Tenant v. Elliott*, 1 Bos. & Pull. 3; *Merritt v. Millard*, 4 Keyes, 208. This principle is based upon the undoubted right of a person to waive the illegality, and pay the money; and that when once paid, either to the other party directly or to a third person for his use, it cannot be recalled; and that the third person, who was in no way connected with the original transaction, cannot avail himself of a defense which his principal saw fit to waive.

If the only illegal transaction was the contract with Haroun for the sale of the bid, these principles might be applicable, and would probably constitute a good answer to the objection to this counter-claim. The payment of the money by Haroun completed that contract, and nothing remained unexecuted. But here the original partnership was illegal; not because of its purposes and objects, but its composition was prohibited by law. If a lawful firm should receive funds from an illegal traffic or business, it may be that the illegality would be regarded at an end, and a division of the money

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enforced by virtue of the rights of the members under the contract of partnership. This is the utmost limit to which the rule can be carried. 2 Wall. 70.

In such a case the obligation to divide would not arise out of the illegal purposes of the firm, nor would the division carry out any of those purposes, but the obligation would arise out of the contract of partnership itself. Here this contract was illegal. The object of the statute was to enable the State officers to know with whom they contracted, and also to see that the statute, prohibiting engineers and other canal officers from becoming interested, was not violated, and to prevent all secret combinations in relation to obtaining work. The money obtained by this bid belongs to the firm; and the plaintiff could have been compelled to divide, if the firm had been lawful, by force of the contract organizing it. In this case he also agreed to pay the money, and defendant asks the court to compel him to perform this obligation. The answer to it is obvious. There is no obligation, because it was incurred contrary to law. It rests upon the contract of partnership, and that is void for illegality.

In law there was no partnership, and none of the parties obtained any rights under the contract creating it. *Armstrong v. Lewis*, 8 Mylne & Keen, 45.

The sentiment "honor among thieves" cannot be enforced in courts of justice. Suppose the engineer had sued for his share after an express promise, would any court have tolerated his claim for a moment in the face of a statute prohibiting him from being interested? If not, in what respect does the defendant occupy any better position? The first step in his case is to prove that he was a secret partner and entitled to a share of this money. The law prohibits secret partners, and he is, therefore, not a partner.

The express promise does not aid the defendant, because the promise was only to carry out the unexecuted provision of the contract of partnership to divide the money. The two cases cited by the counsel for the defendant, if they are to be regarded as good law, are distinguishable from this. In the case of *Faikney v. Renois*, 4 Burr, 2069, one of the two partners had paid £3,000 to settle differences in illegal stock jobbing operations, and the defendant executed his bond to secure the share of the other partner. The court overruled the defense recognizing the exploded distinction between acts *malum prohibitum* and *malum in se*, and held, that, as

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between those parties, the bond was to secure the plaintiff for money paid, and the purposes of the payment would not be inquired into. A similar decision was made upon the authority of this case in *Petrie v. Hannay*, 3 Term, 418, Lord KENYON dissenting. The distinction between the above cases and this is in the circumstance that there the illegal transactions had been closed up and settled, and the obligations sought to be enforced were for money advanced for that purpose. Here it is sought to consummate the illegal contract by a new agreement that it shall be performed. No case has gone this length, and the two cases above cited have been very much shaken by subsequent decisions, and are, to say the least, questionable authority, especially the latter. *Aubert v. Maze*, 2 Bos. & Pull. 370; *Mitchell v. Cockburn*, 2 H. Blacks. 380; *Ex parte Daniels*, 14 Ves. 190; *Lowry v. Bourdieu*, Doug. 467; *Brown v. Turner*, 7 Term, 626; *Belden v. Pitkin*, 2 Caines, 147, note a.

The general rule on this subject is laid down in this court in *Gray v. Hook*, 4 Comst. 449, by MULLETT, J., as follows: "The distinction between a void and valid new contract in relation to the subject-matter of a former illegal one depends upon the fact whether the new contract seeks to carry out or enforce any of the unexecuted provisions of the former contract, or whether it is based upon a moral obligation growing out of the execution of an agreement which could not be enforced by law, and upon the performance of which the law will raise no implied promise. In the first class of cases, no change in the form of a contract will avoid the illegality of the first consideration, while express promises based upon the last class of considerations may be sustained."

It is sometimes difficult to apply general rules to particular cases, but this case comes clearly within the first class mentioned in the above rule. It is not from any regard to the rights of the party setting up this defense that courts refuse to enforce illegal contracts, but it is for the protection of the public. The plaintiff in this case is entitled to no sympathy or favorable consideration. He must have made an affidavit that no other person was interested with him in the proposal, and when he received this money, as between him and the defendant, the latter was entitled to it; and while we have no disposition to justify his conduct, his position entitles him to secure the advantage of a decision which we are compelled to make in obedience to a principle of public policy which is indispensable

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for the protection of the community against the corrupting influences of illegal transactions.

The observation of Lord MANSFIELD in *Holman v. Johnson*, 1 Cowp. 343, is applicable here. He said: "The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant (in this case the plaintiff). It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may so say."

Judgment must be reversed and a new trial ordered, costs to abide the event.

Judgment reversed, and a new trial ordered.

SPRINGFIELD FIRE INSURANCE COMPANY AND ANOTHER V. ALLEN AND OTHERS, appellants.

(48 N. Y. 389.)

Fire insurance — subrogation — rights of mortgages and owner.

One of the defendants procured insurance with the plaintiffs upon certain buildings owned by him. By the terms of the policies the loss was payable to the owner of a mortgage on the insured premises. The owner of the mortgage was protected against forfeiture of insurance by reason of the acts of the owner of the property, and the insurers were, in case of payment of insurance to mortgagee, to be subrogated to his rights. The policies also provided that, in case of any change of title in the property insured, they should be void. Subsequently to effecting insurance, the defendant sold and conveyed the premises insured, soon after which they were destroyed by fire. *Held*, that the owners of the premises could not have recovered upon the policies, and that they were not entitled to have the payment of the amount insured by the insurers to the owner of the mortgage applied in satisfaction of the mortgage.

APPEAL from judgment of general term of superior court of Buffalo, affirming judgment of special term in favor of plaintiff.

Action to foreclose a mortgage.

In 1859, Orlando Allen mortgaged certain premises in Buffalo to

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one Williams. The mortgage contained a provision that the mortgagor should keep the buildings situate on the premises insured, and the policies assigned to the mortgagee. In 1861, that portion of the premises upon which the buildings stood was conveyed by Orlando Allen to William K. Allen. In 1862, insurance on the buildings was effected in the two companies who are plaintiffs in this action. The conditions of insurance were substantially the same in both policies. The policy in one company was in the name of Orlando Allen, the loss (if any) payable to Abby G. Williams, as mortgagee, in the other, in the names of Orlando Allen, as owner, and Abby G. Williams, as mortgagee, as interest might appear.

Each policy provided against a forfeiture of the insurance in favor of the mortgagee by reason of the acts of the mortgagor and for the subrogation of the insurers to the rights of the mortgagee upon payment of the amount of loss covered by the policy. It also provided that "in case of any change of title in the property hereby insured" the policy should be void. Each policy was for \$2,500, and was procured by the mortgagor.

In May, 1864, Orlando Allen and William K. Allen united in a conveyance of the premises to Peter J. Ferris, and Ferris assumed the payment of the mortgage. It was agreed verbally that Ferris should have the benefit of the insurance.

The buildings were destroyed by fire June 19, 1864, and on the 18th of October, in the same year, the plaintiffs paid to the owner of the mortgage the amount due thereon, took an assignment of the mortgage to themselves, and brought this action to foreclose the same.

John Gansen, for appellants.

E. C. Sprague, for respondent.

ALLEN, J. The parties to the policies of insurance have, by the terms of their contract, avoided some of the questions which have embarrassed the courts, and led, in some instances, to an apparent conflict of opinion, if not of decision. The rights of the mortgagees are protected against the effect of certain acts of the mortgagor in derogation of the policies, by an agreement that the policies, as to the interest of the mortgagee, shall not be invalidated by any act or neglect of the mortgagor, with the qualification, however, that, if the

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mortgagee fail to notify the insurers of any change of ownership after the same shall have come to his knowledge, the policies shall be void. They have definitely determined the question, perhaps not definitely settled by adjudication, as to the right of subrogation by an agreement making part of the contract of insurance, that, whenever the insurers shall pay to the mortgagee any sum for loss, for which loss the company would not have been liable to the mortgagor or owner, the insurers shall be subrogated to the rights of the mortgagee, and entitled to an assignment of the mortgage. This provision is probably in accordance with the legal and equitable rights of the parties, regarding the policy from the time it might become void as to the mortgagor as an insurance, existing only in favor and for the benefit of the mortgagee, and as an insurance upon his interest as mortgagee, and not as an insurance upon the property generally; although the doctrine has been questioned in *King v. State Mutual Ins. Co.*, 7 Cush. 1, § 2; Phil. on Ins., §§ 1512, 1712; *Kernochan v. N. Y. Bowery Fire Ins. Co.*, 17 N. Y. 428; *Roberts v. Traders' Ins. Co.*, 17 Wend. 631; *Carpenter v. Washington Ins. Co.*, 16 Pet. 495; *Tyler v. Aetna Ins. Co.*, 12 Wend. 507; and S. C., 16 id. 385, per Chancellor.

If, then, the mortgagor, who was the party primarily insured, could not, for any reason, have enforced the policies, and recovered thereon for his own benefit, either as owner, or as having an insurable interest as the mortgagor, personally liable for the payment of the mortgage debt, he is precluded, by the terms of the policies, from claiming the benefit of the insurance in satisfaction of the mortgage debt, and the insurers are entitled to be subrogated to the rights of the mortgagee. The mortgagee was equitable assignee of the policies, containing a provision which, upon the happening of certain events, should absolutely vacate and avoid the insurance as of the property generally and as a contract of indemnity to the mortgagor, and resolve it into an insurance of the interest of the mortgagee as such, and make it a personal contract with her, in which the mortgagor would have no interest. Per SHAW, C. J., *King v. State Mut. Fire Ins. Co.*, 7 Metc. 1; Per STORY, J., *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507. Ferris, the grantee of the premises and owner of the equity of redemption, can, as the representative and equitable assignee of Allen, claim no greater rights under the policies than his grantor and assignor, Allen, could have claimed. *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391.

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The policies were made and accepted by Allen, the insured, with full knowledge of and subject to all the terms and conditions expressed therein, and he had personal knowledge of every fact and circumstance affecting their validity existing at the time they were made, and was a party, and assenting to every act which has been alleged as breaches of the conditions of the policies, and as avoiding them as to him, and all (except the mortgagees) claiming under him. One of the conditions of each of the policies was, that in case of any change or transfer of title in the property insured, the policy should be void and cease. A contract of insurance, like every other contract, must be so construed as to give effect to the intent and understanding of the parties, and the language employed must be taken in its ordinary popular sense, unless it appears to have been used in a technical sense, or custom, or usage has impressed a different meaning upon it. 1 Phil. on Ins., § 121, and see *Whiton v. Old Colony Ins. Co.*, 2 Metc. 1; *Mutual Safety Ins. Co. v. Hone*, 2 Comst. 235. Every part of a policy should be read and construed in obedience to this rule. There was a change and transfer of the title of the property, which was the subject of the insurance after the insurance was effected, and before the loss. If the words employed were used in their popular sense, this condition of the policy was violated, and the policy as an insurance of the property, generally, and for the benefit of the mortgagor and owner ceased. Had the parties intended only to provide for a change in, or transfer of, the interest of the assured, which in one sense is "the property assured," it may be assumed that language more appropriate to express the idea would have been chosen. An insurable interest may exist without any estate or interest in the corpus of the thing insured. As guarantor of the mortgage debt, personally liable for its payment, Allen probably had an insurable interest in the buildings upon the mortgaged premises. *Gordon v. Mass. Fire & M. Ins. Co.*, 2 Pick. 249. But it was an interest that would not ordinarily and popularly be classified as "property;" and any change in such insurable interest would not be spoken of as a change in or transfer of title.

The insurable interest would cease by a discharge of liability for the mortgage debt. "Title" has respect to that which is the subject of ownership, and is that which is the foundation of ownership, and with a change of title, the right of property, the ownership passes. "Property" is a thing owned, that to which a person has, or may have, a legal title. Both words are inappropriate to describe the in

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insurable interest which exists solely by reason of the personal liability of the insured for the payment of a sum of money charged upon the building of goods insured. The word "property" may have different meanings depending upon the connection in which, and the purposes for which, it is used, as indicating the intention of the parties. In *Whiton v. Old Colony Ins. Co.*, 2 Metc. 1, it was used as a part of the description of the subject-matter of the insurance, and was held to include current bank bills, as within the intention of the parties as manifested by the contract and the circumstances under which it was made. Acting upon the same principle of interpretation, it was held that an insurance of property did not cover freight, except as it was to be paid by a specific portion of lumber which was on board the vessel, and which the assured, as carrier, was to receive for freight. It was held that the contract gave the insured an interest in that part of the cargo coming within the term "property," but that the freight upon the other parts of the cargo was not within the term as used. *Wiggin v. Mercantile Ins. Co.*, 7 Pick. 271. To the same effect in *Holbrook v. Brown*, 2 Mass. 280. In the clause prohibiting double insurance, the prohibition is generally in terms so restricted in its application that "property" can mean nothing else but the interest of the assured, whatever that may be. As in the Massasoit policy before us, the condition is, "if the *insured* or his assigns shall hereafter make any other insurance on the *same property*," etc., thus preventing a double and possibly fraudulently excessive insurance of the same interest. Neither the policy of the law or the contracts of insurance forbidding, but permitting as many several insurances upon the same property as there are separate insurable interests. As mortgagor and mortgagee have several interests in the same property, and each may insure to the extent of his interest, the insurances will not be double, and neither will be in violation of the clause forbidding other insurances. Both will be valid. The policy of the law is to prevent insurances in excess of the value of the thing insured, in favor of the same party and against the same risks, and hence the restrictive clause, whatever its form, unless its language clearly demands a different interpretation, should be held as operative to this extent only, and the term *property* in such clause means the interest of the assured. 2 Phil. on Ins., § 1250; *The Traders Ins. Co. v. Robert*, 17 Wend. 631; *Godin v. London Assurance Co.*, 1 Burr, 489; *Mutual Safety Ins. Co. v. Hone*, 2 Comst. 235.

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The interest of Allen by reason of his personal liability for the mortgage debt was properly insured by an insurance of the property, and it was not necessary that the particular interest should be specified. It was enough that he had a pecuniary interest in the preservation and protection of the property and might sustain a loss by its destruction. Neither was it necessary that the nature of the interest should be disclosed to the insurers. *Tyler v. Aetna Ins. Co.*, 12 Wend. 507. When the word "property" is used in the clause forbidding alienation, it is used to designate the thing insured, and not the interest of the insured. Where a special interest, rather than the general property, is the subject of insurance, no such condition is necessary to the protection of the insurer, for the reason that with a loss of interest the insurance ceases (*Carpenter v. Washington Ins. Co.*, *supra*), and an interest in the policy does not pass by a transfer of the interest insured. *Columbia Ins. Co. v. Lawrence*, 10 Pet. 507; 1 Phil. on Ins., § 86. But if the owner is insured generally and transfers the property, retaining a lien for the purchase-money or other special interest, the insurance will continue to the extent of the interest remaining in the insured, if it does not contravene some condition of the policy. 1 Phil. on Ins., §§ 89, 90, 880. As some evidence of the sense in which the term "property" is used in the clause under consideration, it is worthy of remark that, when the policy is upon a special interest, as in favor of a mortgagee, and it is designed to save the policy from the effect of a breach of the condition forbidding a change of title, it is done by a special clause of exception, as in this case and in *Graves v. Hampden Fire Ins. Co.*, 10 Allen, 281.

The policies before us are, in form, upon the property generally, and in favor of Allen as owner. In one of the policies the insurance is in his favor "as owner," and in both it is "upon his two four-story brick stores," etc., and the insurers had, as found by the judge on the trial, no notice or knowledge of any conveyance of the property by Allen. The insurers only knew Allen as owner, and the policies must be interpreted as if they were upon the interest of Allen as owner, and upon the property generally, in fact as they were in form. They were, then, insurers of Allen as owner and Miss Williams as mortgagee, to the extent of her mortgage debt, and both interests are represented and cared for in the policies.

The change or transfer of title in the property insured intended in the clause under consideration was the title, the owner-

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ship of the thing insured, and upon each transfer or change the policy ceased and became void as to the principal party insured, and, but for the saving clause in favor of the mortgagee, would have been void as to her. *Grosvenor v. Atlantic Fire Ins. Co.*, 17 N. Y. 391; and see *Jackson v. Massachusetts Mut. Fire Ins. Co.*, 23 Pick. 418; *Tillou v. The Kingston Mut. Ins. Co.*, 1 Seld. 405. The case last cited may be regarded as greatly shaken, if not overruled, by *Grosvenor v. Atlantic Fire Ins. Co.*, *supra*, so far as it sustained a policy in favor of the mortgagee and equitable assignee, which could not have been enforced by the mortgagor or assignor, but upon the other points decided it has not been questioned. In the elementary treatises this clause is treated as relating to a transfer or alienation of the insured subject, the thing insured (1 Phil. on Ins., § 880), and the question has been as to what has constituted an alienation. See cases cited in 1 Phil. on Ins., *supra*, in notes.

The change of title to the property by the conveyance to Ferris was a breach of the condition which avoided the policies as to Allen, the mortgagor. It is first provided that upon an assignment without consent of the whole policies, or of any interest in them, the liability of the insurer shall cease, and then follows the very general clause prohibiting "any sale, transfer or change of title in the property;" and by another clause in the policies, it is provided that if the mortgagee should neglect to notify the insurers of any *change of ownership of the property insured*, after the same should come to her knowledge, the policy should be void; all indicating clearly that the parties used the term "property" in its popular sense, and that the change of the title referred to was of the thing insured, of which the mortgagee might have no knowledge, and not of the mortgage interest, of which she would necessarily have knowledge.

The mortgagor could not have recovered upon the policies, and it follows that he is not entitled to have the moneys paid under the policies to the mortgagee, applied to the satisfaction of the mortgage.

The judgment should be affirmed with costs.

GROVER and PECKHAM, JJ., concurred in the result, on the ground that Allen was insured as owner when he was not such owner, and that the special interest should have been disclosed and stated in the policy.

Judgment affirmed.

Union National Bank v. Sixth National Bank.

UNION NATIONAL BANK v. SIXTH NATIONAL BANK, appellant.

(43 N. Y. 483.)

Mistake of fact—payment under.

The defendant, located at New York, sent to plaintiff, located at Troy, for collection, a note payable at a bank about thirty miles from Troy. The note was not paid, and notice of non-payment, etc., was sent by mail to plaintiff and defendant. Defendant received the notice and collected the amount of the note from an indorser. Plaintiff did not receive notice, and, assuming the note to have been paid, forwarded its amount to defendant, who at once paid back the indorser. Subsequently, upon discovering that the note had not been paid, plaintiff claimed the amount paid to defendant. *Held*, that the plaintiff was entitled to recover the money paid under a mistake of fact; that the payment back to the indorser was not sufficient to excuse defendant, it having had, at the time of plaintiff's making claim, means to secure itself against loss.

APPEAL from judgment of general term of supreme court in third judicial district, affirming judgment for plaintiff on report of referee.

Action to recover money paid under a mistake of fact.

One Bassett, residing at Chatham, made his note, payable to the order of one Ashley at the Columbia Bank at Chatham. Ashley also resided at Chatham. The note was subsequently indorsed by Davidson and Cregan, residents of New York city, and discounted by the defendant, a bank in that city, for Cregan. Before the maturity of the note the defendants sent it for collection to plaintiff, a bank located at Troy, about thirty miles from Chatham. Plaintiff forwarded the note to the Columbia Bank. The note, not being paid at maturity, was protested, and notices sent by mail to plaintiff and defendant, and others interested. The defendant received the notice intended for it, and immediately applied to Cregan, who paid the amount of the note. The plaintiff did not receive the notice intended for it, and, supposing the note to be paid, forwarded the amount to defendant. Upon receiving this amount, the defendant, believing the note to have been paid after protest, returned to Cregan the amount previously paid by him. Several days afterward plaintiff wrote the Columbia Bank about the note, and received in return the note protested, which was at once sent to the

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defendant, and claimed a return of the money sent to defendant for the note. The defendant refused to pay, on the ground that they had paid over to Cregan, who refused to return the money, alleging that he had parted with security on receiving it. Cregan afterward became insolvent.

Samuel Hand and James Emott, for appellants.

Charles F. Tabor, for respondent.

FOLGER, J. The rule established by the class of cases, of which *The Kingston Bank v. Eltinge*, 40 N. Y. 391, is one, is not questioned by the counsel for appellants. But he insists that there is a distinction between them and the case in hand. Admitting that there was a mutual mistake in supposing that the note was paid, when it was not paid, he claims that the respondents were negligent in not making inquiry and using the means at their hand for arriving at correct information of the facts. But as a sufficient answer to this, it is held that it is no bar to an action, that the party paying had the means of knowing, and might have availed himself of those means by care and attention, and thus have arrived at exact knowledge. *Waite v. Leggett*, 7 Cow. 195.

“Care and diligence are not controlling elements in the case. It is a question of fact merely. The inquiry is, are the parties mutually in error, and did they act upon such mutual mistake? Was there or not an error between the parties? And the determination of the fact controls the result.” *Kingston Bank v. Eltinge, supra*.

If the money “is paid under the impression of the truth of a fact, which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact.” *Kelly v. Solari*, 9 M. & W. 54; *Marriott v. Hampton*, 2 Smith’s Lead. Cas. 403, notes. If it were conceded that the plaintiffs were subject to the imputation of negligence, that alone would not bar their action.

The appellants’ counsel urges, however, that the plaintiffs were the agents of the defendants; that it was their duty to collect the note and remit the proceeds, or to return promptly the protested paper. They did not fail in the first branch of this duty, for the note was not paid; nor did they fail in making protest, etc., of the note. For that was done, by which all prior indorsers to the

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defendants were charged. Notice of non-payment was also given to the defendants. It would not be claimed, if the transaction had stopped here, that the defendants would have any cause of complaint against the plaintiffs. It must be remembered that the notice of non-payment meant for the plaintiffs was lost from or miscarried in the mail. They were authorized to act upon the natural inference, from the usual course of business, that, no notice having been received of non-payment of the note, payment had been made.

There was thus far no failure of duty to the defendants. And the case stands the same as if the relations of the plaintiffs and defendants were not those of agent and principal. And the omission on the part of the plaintiffs to make inquiry, and obtain correct knowledge, is no more prevalent against them than it would be if they had not been the agent of the defendants.

The appellants' counsel makes the point also, that the defendants, relying upon the act of the plaintiffs, and paying over the money to Cregan, from whom they cannot recover it, have been irreparably injured, and that the plaintiffs are estopped from denying their assertion to the defendants that the note had been paid. The facts bearing upon this must be considered as they existed on the day on which the plaintiffs first sought from the defendants repayment of the money. This was about the 11th of February, 1866; and for sometime subsequent thereto, Cregan was a dealer with the defendants, and had on deposit with them an average amount large enough to have met this payment, and the amount of the note could have been charged against this deposit. It is said that Cregan refused to repay the money, alleging that, believing the note had been paid, he had parted with collateral security. But this is not proven. And the findings of the referee put the refusal of the defendants to repay, on the ground that Cregan could not be required to pay the note. There is no fact found or proven which shows this, or establishes that the maker and indorsers of the note were not on that day just as liable to the defendants as they were at the maturity of the note. *Troy City Bank v. Grant*, Lalor's Supp. 119; *Wilkinson v. Johnson*, 3 Barn. & Cress. 428. The defendants having, at the time of the plaintiffs' demand upon them for repayment, all the means of securing themselves from loss, which they had on the day on which the note matured, and thus being in the same situation in which they were before the payment by the plaintiffs, cannot claim that they were immediately injured by the act of the plaintiffs. When injury

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does not necessarily result, it is wholly immaterial as respects the plaintiffs' right to recover. And it is for the defendants to show that injury has resulted. *Guild v. Baldrige*, 2 Swanst. (Tenn.) 295-304; and see *Rheel v. Hicks*, 25 N. Y. 289.

The judgment of the general term should be affirmed, with costs, to the respondent.

CHURCH, Ch. J., and ALLEN and GROVER, JJ., concur. ALLEN, J., expressly on the ground that the defendants did not necessarily sustain loss by the mistake. They were notified in time to reclaim the money of Cregan, and there is no evidence to show that the situation of Cregan or the defendants has been changed in the mean time, or that either had parted with any security.

Judgment affirmed.

ECKERT v. LONG ISLAND RAILROAD Co., appellant.

(43 N. Y. 502.)

Negligence — injury in attempt to save human life.

Plaintiff's intestate, while endeavoring to rescue a child from being run over by an approaching railway train, was himself struck by the train and so injured that he died. *Held*, that it was proper to submit to the jury the question, whether the negligence of the deceased contributed to the injury.

The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. Although an exposure to injury, for the purpose of saving property is negligence, for the purpose of saving human life, it is not so, unless such as to be regarded rash or reckless.

APPEAL from judgment of general term of supreme court in second judicial district affirming a judgment in favor of the plaintiff, upon verdict of jury in the city court of Brooklyn.

Action to recover damages for the death of plaintiff's intestate through the negligence of defendant's servants and agents.

Henry Eckert, husband of plaintiff, was on the 26th day of November, 1867, standing about fifty feet from the track of defend-

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ant's railroad in East New York, conversing with a friend. A train from Jamaica was approaching. The engine was running backward with the cow catcher toward the train.

According to the testimony of plaintiff's witnesses, the train was running at a speed of twelve to twenty miles an hour, and no signals were heard by them, either from the engine whistle or bell. The neighborhood was thickly populated, and was one of the stations of the railroad. These witnesses also testified that a small child, between three and four years old, was sitting on the track in front of the approaching train, that Eckert, seeing the dangerous position of the child, ran and seized it, and threw it clear off the track on the opposite side crossing the track himself. That he was struck by the engine or tender, and so injured that he died the same night.

The defendant gave evidence to show that the train was moving at a moderate speed not over seven or eight miles an hour, that the signals required by law were given, and that the child, instead of being on the track before the train, was on a side track. The defendant at the close of plaintiff's case moved for nonsuit, on the ground that the negligence of the deceased contributed to his death, which motion was denied. The whole evidence being on the question of negligence of deceased, and whether it contributed to the injury was submitted to the jury, who found in favor of plaintiff.

Aaron J. Vanderpool, for appellant, cited *Evansville R. R. Co. v. Hyat*, 17 Ind. 102; *Grippen v. N. Y. C. R. R. Co.*, 40 N. Y. 34, 50; *Ernst v. Hudson R. R. Co.*, 39 id. 91; *Wilcox v. Rome & Watertown R. R. Co.*, 39 id. 61; *Havens v. Erie Railway*, 41 id. 296.

George G. Reynolds, for the respondent, cited *Mangam v. Brooklyn City R. R. Co.*, 38 N. Y. 455; *Newson v. N. Y. C. R. R. Co.*, 39 id. 383, 390; *Johnson v. Hudson River R. R. Co.*, 20 id. 65, 71; *Ernst v. Hudson River R. R.*, 35 id. 26; *Munger v. Tonawanda R. R.*, 5 Den. 225, 264, 265; *Fero v. Buffalo and State Line R. Co.*, 22 N. Y. 213; *Stokes v. Salstonstall*, 13 Pet. 181; *Shearman & Redf. on Negl.* 27, 28; *Wild v. Hudson R. R. R. Co.*, 33 Barb. 503, 507, 508, 509; *Collins v. Albany and Schenectady R. R. Co.*, 12 id. 492.

GROVER, J. The important question in this case arises upon the exception taken by the defendant's counsel to the denial of his

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motion for a nonsuit, made upon the ground that the negligence of the plaintiff's intestate contributed to the injury that caused his death. The evidence showed that the train was approaching in plain view of the deceased, and had he for his own purposes attempted to cross the track, or with a view to save property placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such injury. But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fail and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence, which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life, it is not wrongful, and, therefore, not negligent, unless such as to be regarded either rash or reckless. The jury were warranted in finding the deceased free from negligence under the rule as above stated. The motion for a nonsuit was, therefore, properly denied. That the jury were warranted in finding the defendant guilty of negligence in running the train in the manner it was running, requires no discussion. None of the exceptions taken to the charge as given, or to the refusals to charge as requested, affect the right of recovery. Upon the principle

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above stated, the judgment appealed from must be affirmed, with costs.

CHURCH, Ch. J., PECKHAM and RAPALLO, JJ., concur.

ALLAN and FOLGER JJ., dissent.

Judgment affirmed.

NORTHRUP, appellant, v. RAILWAY PASSENGER ASSURANCE CO.

(43 N. Y. 514.)

Insurance against death while traveling — construction of notices.

The plaintiff's intestate held a policy by which defendant agreed to pay a certain sum in event of intestate's death, etc., "when caused by any accident while traveling by public or private conveyances provided for the transportation of passengers." The defendant in prosecuting a journey, while passing on foot by the usual route from a steamboat landing to a railway station about seventy rods distant, slipped and fell, from which she received injuries causing death. *Held*, that such injury and death were within the terms of the policy. An injury received while necessarily walking in the actual prosecution of a journey is received while traveling in a public conveyance within the meaning of the policy, when such walking is the actual and necessary accompaniment of such travel.

APPEAL from judgment of general term of supreme court in seventh judicial district in favor of defendant upon case submitted under the provisions of the code of procedure.

Action to recover \$5,000 upon a contract of insurance made by defendant with plaintiff's intestate. The policy was issued to Mrs. Lucilla Northrup on the 30th of December, 1868, when she was starting on a journey. By its terms the defendant agreed to pay the person assured, or her representatives, the sum of \$5,000, "in the event of her death from personal injury ensuing within three months from the happening thereof, when caused by any accident while traveling by public or private conveyance, provided for the transportation of passengers in the United States" The remaining facts appear in the opinion.

David Ramsey, for appellant.

William F. Cogswell, for respondent.

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GROVER, J. It must be conceded that the injury received by the plaintiff's intestate does not come within the strict literal words of the contract of assurance. By that contract the respondent agreed to pay the legal representatives of the intestate, in the event of her death from personal injury ensuing in three months from the happening thereof, when caused by any accident while traveling by public or private conveyances, provided for the transportation of travelers, etc. The intestate was not actually traveling upon any public or private conveyance provided for the transportation of passengers at the time of receiving the injury which caused her death. It appears, from the facts agreed upon by the parties, that the intestate, prior to such time, had undertaken to go a journey from Steuben to Madison county; that the mode adopted for making the journey was by rail from Steuben to Watkins, in Schuyler county, thence by steamer to Geneva, thence by rail to Madison. That the intestate, in the prosecution of such journey, had arrived at Geneva on board the steamer, and, as usual, was passing on foot from the steamboat landing to the railway station to go on board of the cars for the remainder of her journey; and while so passing from the landing to the station, a distance of about seventy rods, she slipped and fell, thereby receiving an injury which caused her death about four days thereafter. It further appears, that, upon the arrival of the boat at Geneva, there were usually hacks at the landing seeking passengers for any part of the village, or the railroad station, but that a large majority going to the railroad station went there on foot. The question for determination is, whether, at the time of receiving the injury, the plaintiff was, within the meaning of the policy, traveling by a public or private conveyance. The policy must be construed so as to carry into effect the intention of the parties, so far as such intention can be determined from the language used, construed in the light of well-known extrinsic facts, which must be presumed to have been known to the contracting parties at the time of making the contract, and in reference to which it was entered into. One fact of this character, very important in the present case, is that of the frequent change required from one train of cars to another at intermediate stations upon the same journey. Those passing from Buffalo, or the Falls, to New York by the New York Central, or from the former or Dunkirk to the same by the Erie, cannot be unaware of this fact. Can it be said that a passenger is not traveling, within

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the meaning of this contract, by public conveyance while passing from one train to go on board another in the actual prosecution of his journey ; or, for further illustration, can this be said of a passenger from New York to Dunkirk by the Erie, while going from the ferry-boat at Jersey City to get on board of the train at that place? I think that such passenger, within the meaning of this contract, and also within the fair construction of the language, is a traveler by public conveyance all the way from New York to Dunkirk, although he may walk a short distance from the ferry-boat to the train at Jersey City, or from one train to another, when such changes are made at intermediate stations. An injury received while so necessarily walking in the actual prosecution of the journey is received while traveling by public conveyance within the meaning of the policy, as such walking is the actual and necessary accompaniment of such travel. There is no difference in principle between a passenger so walking and the intestate in the present case. The presumption is, that the railroad trains and the steamer run in connection, the same as the ferry-boat from New York to Jersey City with the Erie trains, and that by means of this connection the journey of the intestate was designed to be continuously prosecuted ; and it surely can make no difference in principle, that the space to be walked over in going from one conveyance to another is a few steps more or less. Nor does it affect the question that the intestate might have procured a hack to carry her, had she so have chosen. She pursued the same course that the great majority of passengers did. This she had a right to do under the contract. *Theobald v. Railway Passenger Assurance Company*, 26 Eng. Law & Eq. 432, sustains this view. In that case, the assurance was against railway accident, while traveling in any class carriage, on any line of railway in Great Britain, etc. This was held to include an injury received from slipping on the step of the car, while standing at the station, in getting out. It follows that the judgment appealed from must be reversed, and a judgment of \$5,000, with interest thereon, from the time the loss became payable, rendered in favor of the appellant against the respondent, together with costs in this and in the supreme court.

Judgment reversed.

Bennett v. Cook.

BENNETT v. COOK, appellant.

(43 N. Y. 537.)

Statute of Limitations — non-resident.

IN bar of an action on a draft the statute of limitations was pleaded. It appeared that seven years had elapsed since the cause of action accrued, and that the defendant was a resident of New Jersey, but had done business ten hours each day in New York ever since. *Held*, that if a *non-resident* can be allowed any time under the statute of limitations, it must amount in the aggregate to six years of actual presence within the State in order to bar the action.

ACTION on a draft by Bennett against Cook *et al.*, brought May 30, 1868, seven years and five months after the draft matured. At the time the draft matured the defendants all resided out of the State. The next day defendant Cook came to New York city and continued to do so on business days, remaining ten hours each day. Cook had no other place of business; but he continued to reside with his family in Jersey City. At the trial Cook set up the statute of limitations in bar of the action. Verdict for plaintiff, judgment thereon affirmed at general term; whereupon defendant Cook further appealed to this court.

Nathaniel C. Moak, for appellant.

Samuel Hand, for respondent.

PECKHAM, J. Upon the facts in this case, there is no theory in the law which can maintain this plea.

At the time the draft in suit was protested in New York city, for non-payment, the defendant was a non-resident of this State. He returned to the city the next day thereafter, and remained there from about eight in the morning until six in the evening, and then returned to his residence in Jersey City, and thus he continued to return to the city of New York for about the same length of time each day, except Sundays, and except a very few days when absent from sickness, or unavoidably detained, until this suit was commenced, being for about seven years and over. He went to New

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York city, openly and publicly; had an office there with his name thereon, and had no other place of business. During all that time, however, he resided with his family in Jersey City.

The counsel for the defendant insists that the time which the defendant was actually in the city of New York should be allowed as so much time running under the statute.

If that should be allowed it makes no defense. He was not only a resident of New Jersey, but he was actually in that State more than half of the seven years. He was in New York at no time more than ten of the twenty-four hours of each day. The authorities have been fully referred to and ably discussed. But there can be no pretense for claiming the allowance of more than ten of the twenty-four hours each day for the running of the statute, if he can be allowed any time at all, when a non-resident of the State, and, as that makes no defense, there is no occasion to decide any thing more.

Judgment affirmed with costs.

RAMALEY v. LELAND, appellant.

(48 N. Y. 539.)

Hotel keeper — liability to guest for stolen property — construction of statute.

By an act of the legislature of 1855, it was provided that "whenever the proprietor or proprietors of any hotel shall provide a safe in the office of such hotel or other convenient place for the safe keeping of any money, jewels or ornaments belonging to the guests of such hotel, and shall notify the guests thereof, by posting a notice (stating the fact that such safe is provided, in which such money, jewels or ornaments may be deposited) in the room or rooms occupied by such guest, in a conspicuous manner, and if such guest shall neglect to deposit such money, jewels or ornaments in such safe, the proprietor or proprietors of such hotel shall not be liable for any loss of such money, jewels or ornaments, sustained by such guest, by theft or otherwise." In action to recover the value of a gold watch, with the chain, seal and key attached, valued at \$350, and \$50 in money stolen from the plaintiff's room at defendant's hotel, during the night, *held*, that if the notice was posted according to law, and the safe provided, the plaintiff could recover for the property stolen, but not for the money.

ACTION by Ramaley against Leland *et al.*, innkeepers, to recover for property stolen while plaintiff was a guest at defendants' hotel. In April, 1867, plaintiff was a guest at the Metropolitan Hotel of

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New York, of which the defendants were proprietors, and on retiring to his room for the night he locked the door and put his gold watch, chain, seal and key (valued at about \$350), and \$50 in money under his pillow. During the night the watch and appendages and the money were stolen. At the trial the defendants offered to prove that a notice that a safe was provided for valuables was posted in the room of plaintiff according to the law of 1855, regulating the liabilities of innkeepers. This evidence was excluded, and defendants excepted. The question of negligence on the part of both plaintiff and defendants was submitted to the jury. Verdict for plaintiff for the value of the watch, etc., and the money. The judgment on the verdict was affirmed at general term, whereupon defendants further appealed to this court.

J. Fitch, for appellant.

J. N. and J. A. Balestier, for respondent.

ALLEN, J. The plaintiff's claim was for the value of a gold watch, with the chain, seal and key attached, found to be worth \$353, and \$50 in money, stolen from his room, at the defendants' hotel during the night of April 9, 1867, and the recovery was for the money, as well as the watch. The defendants were exonerated from liability for the money, if they had provided a safe in the office of the hotel for the safe keeping of money, jewels and ornaments, and a notice stating the fact was conspicuously posted in the room occupied by the plaintiff. Laws of 1855, ch. 421; *Hyatt v. Taylor*, 42 N. Y. 258. The judge, therefore, erred in the exclusion of the evidence offered, to prove the fact that the notice prescribed by the act was posted as required.

Proof was given that a safe had been provided, and was then in the office for the safe keeping of the property of guests. If the evidence offered and rejected had been admitted, there could have been no recovery for the money. The defendants were liable for the other property, under the rule of the common law, making innkeepers the absolute insurers of the property of guests. *Hulett v. Swift*, 33 N. Y. 571.

The statute permits a proprietor of a hotel to relieve himself from his strict common-law liability, in respect to certain classes of property, upon compliance with the prescribed conditions. But the exemption is limited to the particular species of property named, and

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being in derogation of the common law, cannot be extended in its operation and effect by doubtful implication, so as to include property not fairly within the terms of the act. The rules of the common law touching the liability of innkeepers, common carriers and the like, have not been relaxed by the courts and are in full force, except as expressly changed by statute, or as they may be modified by special contract. By statute, the proprietors of hotels may provide a place of safe keeping of "money, jewels or ornaments" belonging to guests, and by so doing, and giving notice as directed, they are not liable "for such money, jewels or ornaments," by theft or otherwise. Certain property particularly valuable in itself, taking but small space compared with its value for its safe keeping, easy of concealment and removal, holding out great temptation to the dishonest, and not necessary to the comfort or convenience of the guest while in his room, is made the subject of the statutory exemption. Property of a different description, including all that which is useful or necessary to the comfort and convenience of the guest, that which is usually carried and worn as a part of the ordinary apparel and outfit, or is ordinarily used, and is convenient for use, by travelers as well in as out of their rooms, is left, as before the statute, at the risk of the innkeeper. The words of the statute must be taken in their ordinary sense, in the absence of any indication that they were used, either in a technical sense or a sense other than that in which they are popularly used. A watch is neither a jewel or ornament, as these words are used and understood, either in common parlance or by lexicographers. It is not used or carried as a jewel or ornament, but as a time-piece or chronometer, an article of ordinary wear by most travelers of every class, and of daily and hourly use by all. It is as useful and necessary to the guest in his room as out of it, in the night as the day-time. It is carried for use and convenience and not for ornament. But it is enough that it is neither a jewel or ornament in any sense in which these words have ever been used. The question of negligence, and whether the plaintiff could and did bolt his door, were properly submitted to and passed upon by the jury.

Judgment should be reversed and new trial granted, costs to abide event, unless plaintiff within twenty days stipulates to deduct \$50.96 from the verdict; in that case judgment affirmed for the residue, without costs to either party in this court.

All the judges concurring, judgment ordered accordingly.

Brookman v. Hammill.

BROOKMAN *et al.*, appellants, v. HAMMILL *et al.*

(43 N. Y. 554.)

Constitutional law — maritime demands — State lien laws

The plaintiffs attached a sea-going vessel under the New York law (chap. 482, laws of 1862) upon a claim for wharfage. *Held*, that a demand for wharfage being a maritime demand, cognizable in the courts of admiralty, a State statute attempting to confer a remedy for such a demand by proceedings *in rem* is void.

Any State law which attempts to provide for the enforcement of a maritime claim or contract by any but a common-law remedy infringes upon the exclusive jurisdiction of the federal courts, and is a clear violation of the federal compact.

But in so far as the State laws create liens and provide remedies for claims not maritime, over which the courts of admiralty have no jurisdiction, they are valid and operative.

APPEAL from judgment of general term of supreme court in first judicial district, reversing judgment in favor of plaintiff on verdict of jury.

Action upon bond given to discharge a vessel from an attachment issued under the provision of chapter 482 of the laws of 1862, entitled "An act to provide for the collection of demands against ships and vessels." The vessel attached was a sea-going or ocean bound vessel.

The cases in which, under the act in question, a lien is allowed are (with a single exception, relating to collisions caused by negligence) set forth in the first section, which is as follows:

SEC. 1. Whenever a debt amounting to fifty dollars or upward as to a sea-going or ocean bound vessel, or amounting to fifteen dollars or upward as to any other vessel, shall be contracted by the master, owner, charterer, builder or consignee of any ship or vessel, or the agent of either of them, within this State, for either of the following purposes:

1. On account of work done or materials or other articles furnished in this State for or toward the building, repairing, fitting, furnishing or equipping such ship or vessel;

2. For such provisions and stores furnished within this State as may be fit and proper for the use of such vessel, at the time when the same were furnished;

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3. On account of the wharfage and expenses of keeping such vessel in port, including the expense incurred in employing persons to watch her;

4. On account of loading or unloading, or for advances made for the purpose of procuring necessities for such ship or vessel, or for the insurance thereof;

5. Or whenever a debt amounting to twenty-five dollars or upwards shall be contracted as aforesaid, within this State, on account of the towing or piloting such vessel, or on account of the insurance or premiums of insurance of or on such vessel, or her freight, such debt shall be a lien upon such vessel, her tackle, apparel and furniture, and shall be preferred to all other liens thereon, except mariners' wages."

The remaining sections indicate the procedure to be followed in securing and enforcing the lien.

E. Terry, for appellants.

W. J. Foster, for respondents.

RAPALLO, J. The principle upon which the decision of this court, in the case of *Bird v. The Steamboat Josephine*, is founded, appears, from the opinion of the supreme court in the first district, in the case of *Ferran v. Hosford*, which was followed in the present case, to have been somewhat misapprehended. It is stated, in the opinion referred to, that this court decided, in the case of *The Josephine*, "that a statute passed by a State legislature, conferring the right to a lien on a vessel, and to proceed against her by name, *whatever may be the nature of the claim*, is unconstitutional and void;" and "that, if the proceeding is *in rem*, and against the vessel by name, this is conclusive, and, *per se*, shows that it is one of maritime jurisdiction, and exclusively within the jurisdiction of the district courts of the United States."

As this interpretation of the decision is liable to mislead, it is proper that it should be corrected.

By reference to the opinion of MASON, J. (39 N. Y. 25), it will be seen that the nature of the claim is the essential point upon which the constitutional question turns. He says: "The statute itself is unconstitutional *if this is to be regarded as a maritime contract*, of which a court of admiralty has jurisdiction." The form of proceeding under the statute does not and cannot determine whether the claim which is sought to be enforced thereby is or is not maritime in its nature. It was necessary to examine the form of proceeding, not for the purpose of determining the character of the

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claim but of ascertaining whether the attachment proceeding was or was not a common-law remedy; for, unless it was such, the saving clause in the act of 1789 did not preserve the right to pursue it in a State tribunal in a maritime case.

The invalidity of these attachment laws, when employed to enforce maritime claims, does not result merely from the form of proceeding which they prescribe, but from the fact that the States have, by the constitution, granted to the judicial department of the federal government jurisdiction in all cases of admiralty and maritime jurisdiction, and that congress (as it had power to do) has, by the act of 1789 (1 Stat. at Large, p. 76, § 9), declared the federal jurisdiction in civil causes of that character exclusive, and vested in the district courts of the United States. This act absolutely divests the State tribunals of jurisdiction to enforce maritime claims or contracts, subject only to the proviso which saves to suitors the right in such cases to pursue in the State courts such common-law remedies as the common law is competent to give.

It is impossible to escape the conclusion that any State law which attempts to provide for the enforcement of a maritime claim or contract by any but a common-law remedy infringes upon the exclusive jurisdiction of the federal courts over that class of cases, and is as clear a violation of the federal compact as would be a law providing for the enforcement by State tribunals of the rights of patentees or any other description of claims exclusively cognizable in the courts of the United States. But it is equally plain, that, as to claims, not in their nature maritime, against the owners of vessels, the State jurisdiction is unimpaired, and that, consequently, the act of 1789 imposes no restriction upon the power of the States to prescribe such forms of proceeding for their collection as they may deem appropriate. Nor are ships and vessels, when within the territorial jurisdiction of the States, in any manner exempted from the operation of their laws for the collection of claims, or the creation or enforcement of liens, not founded upon maritime contracts or torts.

To test the validity of these attachment laws, in their operation upon particular cases, two questions must be determined. First: Is the claim of the attaching creditor, to enforce which the statute undertakes to give a lien and attachment, a *maritime claim*, cognizable in the courts of admiralty? Secondly: Is the remedy given by the State law one which the common law did not give? An answer to either of them in the negative leaves their jurisdiction unaffected.

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It follows, that, in so far as these State laws create liens and provide remedies for claims not maritime, and over which the courts of admiralty consequently have no jurisdiction, they are perfectly valid and operative.

We held, in the case of *Sheppard v. Steele*, decided in October, 1870 (*ante*, p. 52), that the claim of the builder of a vessel could be enforced pursuant to the State attachment law of 1862, for the reason that a contract for the building of a vessel had been held by the supreme court of the United States not to be a maritime contract; but a contract "made on land, to be performed on land," and over which the courts of admiralty could not exercise jurisdiction in any form. *People's Ferry Co. v. Beers*, 20 How. 393, 402. So, also, in cases of repairs and supplies furnished to vessels engaged wholly in running between different points within the same State. *Maguire v. Card*, 21 How. 248. And, in cases of contracts for transportation on the lakes, from one point to another, within the same State (*Allen v. Newberry*, 21 How. [U. S.] 245), the same high tribunal decided that the contract was not maritime, and that the federal courts were therefore entirely without jurisdiction therein. If so, they could not proceed either against the vessel *in rem*, or the owner *in personam*; and no State law could confer such power upon them. And those cases refute the idea which at one time prevailed, that the laws of the States giving liens could afford a foundation for proceedings in admiralty. The exercise by the States, therefore, of jurisdiction in that class of cases, under any form of proceeding whatever, could not come in conflict with the powers of the federal judiciary, for it had none. It is true the doctrine of the cases of *Allen v. Newberry* and *Maguire v. Card* has been since denied in the case of *The Belfast*, 7 Wall. 624. But, in so far as those cases recognize jurisdiction in the States to enforce the contracts therein referred to by any other than common-law remedies, such recognition must be based on the supposed absence of jurisdiction in admiralty over such contracts.

There is another class of cases in which the State laws are operative, but for a different reason, viz., claims against vessels navigating the lakes and rivers connecting therewith. The jurisdiction of the States over these cases is protected by the act of congress of February 26, 1845 which expressly saves to suitors not only their concurrent remedies at common law, but also any concurrent remedy which may be given therein by the State laws where the vessel is employed.

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The point chiefly discussed in the case of *The Josephine* was not the exclusive character of the original jurisdiction of the district courts over claims of a maritime nature; for that was conceded to be established by the cases of *The Moses Taylor*, 4 Wall. 411, and *Hine v. Trevor*, id. 555. But an endeavor was made to distinguish the case of *The Josephine* from those cases, on the ground that *The Josephine* was attached for supplies furnished in her home port, and that the courts of the United States did not recognize a maritime lien for supplies to domestic vessels.

The question of maritime lien, and of the kind of process which the courts of admiralty would issue, was attempted to be confounded with the question of admiralty jurisdiction; and various *dicta* which had fallen from some of the justices of the supreme court, before the critical examination given to the jurisdictional questions in the cases of *The Moses Taylor* and *The Hine* had been made, were cited in support of the proposition that, in maritime cases in which the courts of admiralty refused process *in rem*, the parties were at liberty to resort to State laws giving that form of remedy.

When process *in rem* is refused by the courts of the United States on the ground of a want of jurisdiction over the cause of action, as in the cases of *People's Ferry Co. v. Beers*, *Allen v. Newberry*, and *Maguire v. Card*, the correctness of the remark made by Mr. Justice NELSON, in the last-mentioned case, to the effect that such cases must be left to the State tribunals, cannot be questioned. Nor can there be a doubt of the accuracy of the incidental remark of Mr. Justice CLIFFORD, in *The Belfast*, 7 Wall. 624, 645, as applied to like cases, viz., that a maritime lien does not arise for materials and supplies furnished to a vessel in her home port, and that it is competent for the States to create liens therefor, and provide for their enforcement. That observation must be understood as applicable to cases in which the contract is not maritime, and the admiralty courts consequently have no jurisdiction; for the learned justice expressly states that the cases to which he refers fall within the same category with contracts for ship-building, which, he says, are not maritime contracts. He expressly denies the power of the States to create or enforce maritime liens (p. 644). No point as to materials or supplies was involved in the case of *The Belfast*. The attachment was on a contract of affreightment, and the State attachment law was held void.

The whole tenor of the opinion of the learned justice shows that

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he should not be understood as saying that, in a maritime case, within the jurisdiction of the admiralty, the States can give a remedy *in rem*, for the reason simply that it belongs to a class of cases in which the courts of admiralty confine themselves to process *in personam*. In cases of materials or supplies furnished to vessels engaged in foreign commerce, although furnished at the home port, no doubt can exist as to the *jurisdiction* of the courts of admiralty of the United States. *The General Smith*, 4 Wheat. 438; *The St. Lawrence*, 1 Black, 522. The questions of *lien* and of process *in rem*, in such cases, have been the subject of much discussion and no little confusion. But it has never been questioned that the claims of material men for supplies to domestic vessels not engaged in purely internal navigation of the waters of a State are causes of admiralty and maritime jurisdiction cognizable in some form in the courts of admiralty.

No stronger assertion of such jurisdiction can be made than that contained in the rules which the supreme court has from time to time adopted, and those now in force, in respect to such claims. That court has heretofore, by its rules, not only asserted jurisdiction in such cases, but also the power of issuing process *in rem* therein, under certain conditions. And, since the amendment of 1858 (which abolished the provision of the rule of 1844 allowing process *in rem* against domestic vessels for supplies, when the local law gave a lien), it has been solemnly adjudged by the supreme court that that amendment was prospective merely. That, therefore, where, before the amendment, a libel *in rem* was filed against a domestic vessel for supplies furnished in her home port, the libellant was, notwithstanding the amendment, entitled to a decree of condemnation. It was held in that case, that the question was one of practice, not of jurisdiction; that the contract was within the jurisdiction of the admiralty; that the supreme court had power, under the act of 1842 (5 Stat. at large, 518), to prescribe forms of proceeding; that it was by virtue of that authority that it made the rule of 1844, allowing process *in rem* when the local law gave a lien; that the power to issue such process was derived from the inherent jurisdiction of the court and the rule, and not from the local law; that the amendment of the rule of 1858 did not imply that the court had in the interval become convinced that it wanted jurisdiction, but merely that various considerations made it desirable not to permit that particular form of process in those cases; and that the rule

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was amended in 1858 by the same authority by which it was made in 1844; and the decree of condemnation was accordingly sustained. *The St. Lawrence*, 1 Black, 522, 525, 529, 530.

The twelfth rule in admiralty, as thus amended, and now in force, provides that, in all suits by material men for supplies, etc., for a foreign ship, or a ship in a foreign port, the libellant may proceed either *in rem* or *in personam*; but that the like proceeding *in personam*, but not *in rem*, shall apply to cases of domestic ships for supplies, repairs, or other necessities.

It is self-evident, that, unless a claim for supplies to a domestic ship is a civil cause of admiralty and maritime jurisdiction, the federal courts of admiralty have no power even to issue process *in personam*. The assertion of the power to issue any sort of process necessarily involves an assertion of jurisdiction over the subject-matter of the controversy. When the jurisdiction exists, it is exclusive, subject only to the proviso; and the exclusive character of this jurisdiction is not confined, by the act of 1789, to maritime liens, but extends to all civil causes of admiralty and maritime jurisdiction. There are many such causes where no lien is given or can operate, as, for instance, assaults on the high seas, marine insurance, passage-money, masters' wages, etc.; and to these may be added, cases of supplies to a foreign ship, where the circumstances indicate that the credit was not given to the vessel.

IN view of the rules and decisions of our own supreme court, it is hardly necessary to refer to the limits which have, from time to time, been placed on the jurisdiction of the English courts of admiralty, but which, however, do not apply to ours (*Waring v. Clark*, 5 How. 441; *Bags of Linseed*, 1 Black, 113), or to the extensive jurisdiction of the courts of admiralty of continental Europe, which always recognized the lien of material men for supplies to domestic as well as foreign vessels. *The Brig Nestor*, 1 Sum. 79; 1 Bell Com. 525-527; Ben. Admiralty, §§ 271, 272. It is sufficient to show that, although our courts of admiralty may not recognize such a lien, not deeming the credit given to the vessel, they have retained jurisdiction over the subject of these claims, and that whatever restrictions now exist as to the remedy are self-imposed by our own courts, and do not arise from any lack of jurisdiction over the subject. In view of the doctrine of the case of *The St. Lawrence*, I can see no want of power in the supreme court, should it see fit so to do, to restore the rule of 1844, or to allow a remedy *in*

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rem to material men in all cases. The English parliament, in 1840, restored to the admiralty courts of that nation their jurisdiction in cases of material men, of which they had been deprived for two centuries, but limited it to foreign vessels. *McAlexander*, 1 Rob. Adm. 293, 295; 3 and 4 Vic., ch. 65. And, if the necessities of commerce require that, in this country, there should be a remedy *in rem* in all cases of material men, it is much more appropriate that it should be administered by the courts of admiralty than under the laws which may, from time to time, be in force in the several States, especially in respect to vessels not engaged exclusively in the internal commerce of a State, but which may be subject to liabilities incurred in different States or in foreign countries in favor of persons other than the attaching creditor.

But, whatever remedies may be afforded by the courts of admiralty under their rules, it is declared by the highest federal tribunal that all State statutes which attempt to confer upon State courts a remedy for marine torts or marine contracts, by proceedings strictly *in rem*, are void. *The Hine*, 4 Wall. 555; *The Moses Taylor*, id. 568. The exclusive character of the jurisdiction of the courts of admiralty, when it exists, cannot be affected by the question of lien or the form of remedy. In the case of *The Hine*, the claim was for a marine tort—a collision; but there is nothing in the reasoning of the court from which it could be inferred that the judgment would have been different had the attachment been issued against the vessel for an assault on the high seas by the master on one of his crew; yet, by a provision of the twelfth rule, process *in personam* only could issue in such a case.

The claim in the present case is for wharfage. In a very recent case, decided in the district court of the eastern district of New York (*Kelsey v. The Kate Tremaine*, March, 1871), in an exhaustive opinion by BENEDICT, J., it is shown that from a very early period wharfage demands have been treated as one class of well-recognized maritime demands, regulated by maritime codes, and enforced by maritime courts; that in the colonial vice-admiralty court of the province of Massachusetts there is a record of an action *in rem*, to recover wharfage; that wharfage was recognized as a maritime demand by Judge STORY in *Ex parte Lewis*, 2 Gall, 483; by Judge WARE in the case of *The Phæbe*, Ware, 360, and in the case of *The McDonough*, Gilp. 103; and by the supreme court in the case of *The St. Jago de Cuba*, 9 Wheat. 418.

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It was further held by the learned court in the case of *The Kate Tremaine*, that wharfage was a lien upon the vessel, which might be enforced by process *in rem*, notwithstanding that the boat was a domestic vessel, her owner residing in New York, where the debt was contracted, and notwithstanding the twelfth rule, that the contract being maritime, the right to process *in rem* followed of course, and was denied only to material men, and that a wharfinger did not come under that designation.

Independently of that position, however, the demand for wharfage being a maritime demand, cognizable in the admiralty, the case falls clearly within the decision in the case of *The Josephine*, whether the district courts are authorized to issue process *in rem*, or only *in personam*, for its collection. The admiralty jurisdiction in this class of cases is altogether independent of the doctrine of liens. Per STORY, J., 2 Gall, 485.

It is insisted, however, that the reversal of the judgment was erroneous, for the reason that no question as to the jurisdiction to issue the warrant of attachment was properly before the general term. No such question was raised at the trial, and there is no exception in the case under which it could be presented for adjudication on appeal. On a motion for a new trial the point could have been considered without any exception; but such a motion must be made to the special term in the first instance. Code, § 265. No such motion was made, but an appeal from the judgment was taken directly to the general term; and it is claimed that on such an appeal the court could only review exceptions taken at the trial.

The answer to this objection is, that the appeal brings up the judgment roll as well as the exceptions; and if it appear in the face of this record, either that the court had no jurisdiction of the subject of the action, or that the complaint did not state facts sufficient to constitute a cause of action, this is error, for which the judgment should be reversed, unless the error is such as might be cured by amendment, or by conforming the allegations of the complaint to the facts proved. Code, § 173.

The record does not disclose any want of jurisdiction of the subject-matter of this action, which is brought upon a bond. The question of jurisdiction affects merely the validity of the bond; but the facts stated in the case conclusively show that the bond was void, having been taken by a public officer in a void proceeding, and that no action can be maintained upon it. This difficulty could not be

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obviated by any amendment or proof, and was sufficient ground for the reversal of the judgment by the court at general term.

As the objection to the validity of the bond cannot be obviated, a new trial would be of no avail, and the final judgment of reversal must therefore be affirmed with costs.

Judgment affirmed.

FRASER v. FREEMAN, appellant.

(43 N. Y. 503.)

Liability of master for willful injuries inflicted by servant.

A. was the owner of certain premises which he leased to B. Subsequently A. and his servant, C., attempted to enter upon the premises by force, and, in the conflict which ensued, C. shot B., who soon afterward died of the wound. In a civil action by the representatives of B. to recover, under the statute, damages for the wrongful killing of their intestate, the judge refused to charge that, "if the jury believe that C. fired the shot which caused B.'s death, with the premeditated design to effect his death, A. is not liable for his act." *Held*, error. CHURCH, Ch. J., and FOLGER, J., *dissentiente*.

ACTION by Cesrina Fraser and George C. Bingham, administratrix and administrator of James L. Fraser, against Freeman, Ryan and Mullady for damages for causing the death of the plaintiff's intestate, Freeman alone defending. In 1864 Freeman was the owner of certain premises, a part of which he leased to James L. Fraser to be used as a restaurant. In 1866 Mullady and Ryan were directed by one of the firm, of which Freeman was a member, to perform some work in the basement of the said premises. Some difficulty was had with Fraser, and Freeman came to assist Mullady and Ryan in obtaining access to the basement through the restaurant. The door leading from the restaurant into the basement was locked and Freeman attempted to break it open with a crowbar, in which he was resisted by Fraser and his bar-tender; whereupon Mullady shot Fraser, who died the next day from the effect of the wound.

At the trial the judge was requested to charge (among other things) that "if the jury believe that Mullady fired the pistol shot which caused Fraser's death, with the premeditated design to effect

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his death, the defendant Freeman is not liable for his act." The court refused so to charge and defendant excepted. Verdict for plaintiff for \$5,000, whereupon defendant Freeman appealed to the general term. The judgment was affirmed, and the defendant further appealed to this court.

J. H. Reynolds, for appellant.

Chauncey Shaffer, for respondent.

ALLEN, J. The exceptions taken upon the trial do not present any questions as to the character or degree of force which may be lawfully exerted to obtain access to premises from which the rightful owner is tortiously and forcibly excluded. It will be assumed, for the purposes of this appeal, that the defendant was a trespasser, seeking by force to enter upon the premises in dispute, and that Mullady and the other persons aiding him were employed with a design to overcome all opposition, and to use such force as should be necessary to accomplish the purpose, and that this was illegal, and constituted the defendant, and those present and assisting him, trespassers as against Fraser, the deceased. There were no exceptions to the rulings of the judge at the trial upon this branch of the case.

Under such circumstances the defendant, the principal, putting the others in motion, is answerable for all the necessary or legal and natural consequences that ensue, such as might in the ordinary and natural course of events follow. To this extent he must be regarded as intending all the consequences of the proceedings instituted and carried on by him. The acts of the agent are his acts. The law holds that he ought to have foreseen whatever results naturally or necessarily flow from his unlawful act, and he will be held liable for all that is done by his agents in furtherance of the general design, for acts within the general scope of the design, or which legitimately and naturally result from the purpose. Addison on Torts, 5; *Guille v. Swan*, 19 Johns. 381. But the principal is not liable for the malicious and willful act of the servant, done without his direction or assent. *McManus v. Crickett*, 1 East, 106. For the unauthorized, willful or malicious act of the agent, the principal is never liable. Story on Agency, § 456; *Wright v. Wilcox*, 19 Wend. 343. Judge COWEN, in the case last cited, says: "A man shall be pre-

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sumed to intend the ordinary consequences of his own acts, and especially so far as such consequences may be innocent of all evil intention; for these he may be safely held accountable. But for those which are remote and barely possible he is not accountable; and if they be, at the same time, criminal, it would be violating one of the plainest principles of presumptive evidence to say that he intended them."

Upon the trial, the judge was requested to charge, as a distinct proposition, that if the jury believed that Mullady fired the pistol shot which caused Fraser's death, with the premeditated design to effect his death, the defendant Freeman was not liable for his act. Homicide, when perpetrated "from a premeditated design to effect the death of the person killed, or of any human being," is declared to be murder in the first degree, when it is not manslaughter or justifiable homicide. Laws of 1862, ch. 197. The request was withⁱⁿ the words of the statute and within the statutory definition of murder, and there was nothing in the form of the request to bring the act within any of the degrees of manslaughter or the description of justifiable homicide. To kill "with premeditated design," is to kill "with malice aforethought."

The terms of the request had reference as well to the common law as the statutory definition of murder, and the request was in effect that, if the jury should find that the killing was willful and malicious, the defendant was not responsible for the act. *People v. Enoch*, 13 Wend. 159; *People v. White*, 22 id. 167; *Fitzgerrold v. The People*, 37 N. Y. 413. The jury have not found that the defendant intended murder or the taking of human life, or that it was within the consequences of his act in the necessary and ordinary course of events, and the case was not submitted to them on any such theory. By the refusal to charge as requested, the judge held the defendant liable for the willful and malicious, as well as criminal, act of Mullady. There was no qualification or limitation of the responsibility of the defendant for the acts of his agents; but he was declared chargeable for every thing that was done by them, whether in the course of the employment, and at the instigation of the defendant, or of their own volition, to effect their own purposes, or to gratify their own malice. The law does not charge a master for the malicious act of the servant. *Vanderbilt v. Richmond T. Co.*, 2 Comst. 479; *Croft v. Alison*, 4 B. & Ald. 590.

Willful murder was certainly a remote and scarcely possible result

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of the action of the defendant, and could not have been within his intent, so that it could be said that he performed the act by the hands of his servant, which is the foundation of the ordinary liability of masters for the acts of their servants. The request excluded the idea that the homicide was authorized by the defendant or committed in the furtherance of his plans and purposes, or that it was within the range of possibilities contemplated, or which could have been foreseen by him.

The cause was submitted to the jury upon the theory that the defendant was responsible for all the acts of his servants, whether committed in furtherance of his plans and purposes, and in pursuance of his orders, or of another's, and for purposes of their own. This was in violation of the principles regulating the liability of a master for the acts of his servant. Bacon's Abr. "Master and Servant, K." As joint tortfeasor, the individuals concerned were only liable for the acts of each other, committed in furtherance of the common design, or which they instigated, or in which they took part as aiders and abettors. Other questions are involved; but, as a new trial must be granted for the reason stated, they will not be passed upon. The judgment must be reversed and a new trial granted, costs to abide event.

GROVER, PROCKHAM and RAPALLO, JJ., concurred.

CHURCH, Ch. J., and FOLGER, J., were for affirmance.

Judgment reversed.

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ACCIDENT INSURANCE

See INSURANCE, 1.

ACTION.

See AUCTIONEER; NATIONAL BANKS; PROMISSORY NOTE, 6.

AGENT.

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AGREEMENT.

See CONTRACT.

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See CONSTITUTIONAL LAW, 3, 5, 6.

ASSIGNMENT FOR BENEFIT OF CREDITORS

See BANKRUPTCY, 8.

ATTACHMENT.

H. loaned money to P. at a usurious rate of interest, and after the usury was consummated, H., with intent to defraud his creditors, conveyed land, without consideration, to G., who, in turn, at H.'s request, conveyed it to J., the son of H., also without consideration. Subsequently P. sued H. for the excess of interest, obtained a judgment, and levied upon the land. Thereupon J. conveyed it to M., a *bona fide* purchaser, for a valuable consideration. *Held*, that the purchase-money in J.'s hands was attachable under P.'s judgment. *Heath v. Page*, 533.

See BANKRUPTCY, 8.

AUCTION SALE.

A house fitted only with cold water was advertised for sale at auction as fitted with "hot and cold water," and subject to examination at any time before sale. The mistake was announced by the auctioneer at the opening of the sale. The property was sold to K., who had read the advertisement, but had not examined the house nor heard the announcement as to the mistake. He signed the agreement to comply with the terms of sale, one of which was, that the purchaser should pay the auctioneer \$200 to bind the bargain.

and forfeit that amount if he failed to comply with the terms. At the head of this agreement was the advertisement with the words "hot and" erased. On examining the house and finding no hot water fixtures, K. refused to complete the sale or pay the \$200. In an action by the auctioneer for that sum, *held*, that the sale was binding, and that the action was properly brought in the name of the auctioneer. *Thompson v. Kelly*, 858.

BAGGAGE.

See COMMON CARRIAGE, 13, 14.

BANKS.

See NATIONAL BANKS.

BANKRUPTCY.

1. In an action brought in a State court, by an assignee in bankruptcy, to obtain control of certain property of the bankrupt alleged to have been fraudulently conveyed by him, *held*, that the State courts had concurrent jurisdiction with the federal courts to make a decree of title and possession of the property sued for. *Boone v. Hall*, 288.
2. The mere omission of the name of a creditor and his debt from the schedule of creditors and indebtedness does not, in the absence of design or fraud, affect the validity of a discharge in bankruptcy, as to such creditor. *Payne v. Able*, 316.
3. The sureties in an attachment bond are released by the discharge in bankruptcy of the principal before judgment is rendered against him. *Id.*
4. Payment to a bankrupt, made after publication of notice of warrant in bankruptcy, as required by section 11 of the bankrupt act, although made in good faith and without knowledge of the bankruptcy, is no protection against the bankrupt's assignee. *Stevens v. Mechanics' Savings Bank*, 325.
5. A manufacturer of bricks gave a mortgage upon bricks to secure an existing debt and future advances. The mortgaged property was subsequently sold and delivered with the permission of the mortgagees; and a new mortgage was given on other bricks expressed to be in consideration of the release of the claim of the prior mortgage. The manufacturer was, at the time of giving the new mortgage, insolvent in fact, although he did not file his petition in bankruptcy until a month later. In an action by the assignees in bankruptcy to recover for the property conveyed under this last mortgage, the jury found an intention on the part of the mortgagor to give a preference to the mortgagees, and also that the mortgagees had reasonable cause to believe the insolvency and such intention of the mortgagor. *Held*, that the new mortgage must be regarded as a new security, and not a mere substitution of securities, and that it was void as against the assignees in bankruptcy, under the United States bankrupt act, section 85. *Forbes v. Howe*, 475.
6. In an action on a judgment obtained in New Hampshire, after the defendant had been adjudged a bankrupt, on a debt provable in bankruptcy, a certificate of his subsequent discharge in bankruptcy is no bar to the action.

in Massachusetts, there being no evidence of a different law and practice in New Hampshire. *Bradford v. Rice*, 483.

7. Payment of deposits, by a bank, to a bankrupt at any time after the filing of the petition, although made in good faith and without actual notice of the proceedings in bankruptcy, will not discharge the bank from liability to the assignees for the amount so paid; but it must be proved that the deposits were the property of the bankrupt at the time of filing the petition.

Mays v. The Manufacturers' National Bank, 578.

8. A creditor of P. commenced an action against him in 1869. P. then made an assignment for the benefit of his creditors, and subsequently the action was prosecuted to judgment. *Held*, that the United States bankrupt law of 1867 had no effect upon the assignment, and that it was valid under the law of Pennsylvania as against the judgment-creditor who levied on the assigned property under his judgment. *Beck v. Parker*, 625.

BETTERMENTS.

See MUNICIPAL CORPORATION, 1.

BILL OF EXCHANGE.

See DRAFT.

BONA FIDE PURCHASER.

The purchaser of property, with knowledge in fact of a prior unrecorded conveyance, is not a *bona fide* purchaser, without notice. Such knowledge is equivalent to registration. *In the matter of the Insolvent estate of Conrad Leiman*, 182.

BREACH OF COVENANT.

See DEED; RESTRAINT OF TRADE.

BREACH OF PROMISE.

See SEDUCTION.

BRIDGE.

1. A traveler was injured in crossing an unsound bridge on a highway and recovered damages from the town, the present plaintiffs; and, in an action to recover the amount of the judgment from the defendant, it appeared that the bridge was built by defendant's grantor over an artificial channel dug by him across the highway for the purpose of conducting water to his mills; that defendant was in possession of such channel and mills by deeds requiring him to keep the channel in repair, and that repairs had been made on the bridge by defendant's authority. *Held*, that defendant was liable. *Inhabitants of Woburn v. Henshaw*, 383.

2. The charter of the Pennsylvania and Ohio Canal Co. required it "to build and keep in good repair suitable and convenient bridges over the canal." One of the bridges, being defective, gave away while G. was driving over it, and he received injuries for which he brought suit. *Held*, that the com

pany was liable, even without evidence of actual or willful negligence on its part, and that the jury, in estimating damages, properly considered G.'s pain of mind and body. *Pennsylvania and Ohio Canal Co. v. Graham*, 549.

BROKER.

1. Where a broker purchases stock, through a correspondent, in pursuance of orders from a customer, and in the usual mode of dealing, but the certificates are not called for nor the stock paid for, the broker, after waiting a reasonable time, may sell, or cause to be sold, the stock so purchased, on notice to the customer, and recover for the loss, if any, from the customer. *Rosenstock v. Tormey*, 125.
2. The defendant employed a broker to sell certain real estate for a fixed compensation, advising him of his title; the broker found a customer, and brought him to the defendant, but no sale was effected on account of the defective condition of defendant's title. The property was afterward sold by the defendant, at auction, to a third person, and brought a higher price than the said customer had once offered. *Held*, that the broker was entitled to no compensation on the contract for services. *Toombs v. Alexander*, 349.
3. The defendant sent a proposal to a broker in these words: "If you send, or cause to be sent to me, by advertisement or otherwise, any party with whom I may see fit and proper to effect a sale or exchange of my real estate, above described, I will pay you the sum of \$200." The broker found a person who proposed to purchase the property, but the sale was not effected. *Held* that the broker was not entitled to compensation. *Walker v. Travel*, 332.

CARRIER.

See COMMON CARRIER.

CIVIL WAR.

See INSURANCE, 12, 13.

COMMERCIAL INTERCOURSE.

See CONTRACTS, 2.

COMMISSION.

See BROKER.

COMMON CARRIER.

1. The P. F. & C. railway company received from the plaintiff, at Pittsburgh, goods to be transported to Hudson, Wis., guarantying on its behalf, and in behalf of the other companies and carriers constituting the entire route, that the through freight should not exceed a certain sum, but expressly restricting its liability as carriers to its own route. The connecting companies, acting independently of each other, and having no knowledge of the guaranty, charged their regular rates, each paying to the previous carrier according to the established custom, all back charges. The goods were

transported to Hudson and delivered to the defendant, as warehouseman, by whom the back charges for transportation were paid — the sum exceeding that specified in the guaranty. The plaintiff tendered to defendant the amount due according to the guaranty and demanded the possession of the goods, which was refused. In an action to recover possession, *held*, that the guaranty was not a "through contract;" that each succeeding carrier after the first had a right to charge its usual rates and to pay the usual back charges, and that the defendant had a lien upon the goods for the full amount of the back charges paid by him. *Schneider v. Evans*, 58.

3. It seems that the remedy of the shipper in such case is against the contracting company upon the guaranty. *Ib.*

3. In an action against a common carrier for injuries sustained by a passenger, an instruction allowing the jury, in estimating damages, to consider the "character" of the plaintiff, or his "pain of mind," aside and distinct from his bodily suffering, is error. *Johnson v. Wells, Fargo & Co.*, 245.

4. The death of a passenger was caused by the negligence of the servants of a railroad company while he was riding on the railroad upon a free pass indorsed with the agreement that, in consideration of its receipt by the passenger, he assumed all risk of accident and injury to himself and property, whether arising from the negligence of the agents of the company or otherwise, and that the company should not be liable under any circumstances, and, in an action by the representatives of the deceased, *held*, that the contract was valid and that no recovery could be had against the company. *Kinney v. Central R. R.*, 265.

5. A declaration in an action on contract alleged that the defendants, as common carriers, received the plaintiffs' goods for transportation, and that the goods were injured while in defendants' custody, through the fault of the defendants. The answer, after admitting the receipt of the goods for transportation by the defendants as common carriers, denied that the goods were injured while in their custody, or while they were responsible, or by their fault, and alleged that the defendants had taken reasonable care of the goods while in their custody, and that they were not responsible for the injury, if any, because, by special contract, the risk of injury had been assumed by the plaintiffs. *Held*, that upon the pleadings actual negligence of the defendants might be given in evidence; and that the special contract, if alleged, would not exempt the defendants from liability for injuries caused by their own negligence. *School District v. Boston, Hartford and Erie R. R.*, 502.

6. An oil company shipped a quantity of oil by the Empire Transportation Co., under a condition, set forth in the receipt, that the oil company should assume all risk, and the transportation company should be released from all responsibility for loss or damage. The car containing the refined oil was coupled in a train to one containing crude oil, which took fire from sparks from the engine, and, on account of a defect in the coupling, could not be separated from the car of refined oil, and both were consumed. *Held*, that the transportation company was liable, notwithstanding the condition in the receipt. *Empire Transportation Co. v. Wamsutta Oil Co.*, 515.

7. In Pennsylvania steam tow-boats or tugs are not common carriers as regards the vessels they have in tow and their cargoes. *Brown v. Clegg*, 522.

8. When a railway car is perfect in appearance, but imperfect from some latent defect, which the utmost skill and care could neither perceive nor provide against, the railway company is not responsible for injuries to a passenger arising from the breaking of an axle of the car while running at a proper speed upon a well-constructed road. *Meier v. Pennsylvania R. R. Co.*, 581.
9. The plaintiff shipped goods over the defendants' railroad. By a clause in the bill of lading, the defendants were released from liability "from damage or loss to any article from or by fire or explosion of any kind." The goods were destroyed while on one of defendants' trains, by fire, which caught from a spark from the engine of the train. *Held*, that the defendants were not, by the stipulation in the bill of lading, released from liability for loss arising from its own negligence. *Steinway v. Erie Railway*, 673.
10. It was the duty of the defendant to provide safe and proper machinery for working its road, and it was negligent if the engine hauling the goods was, in its construction and appliances, lacking in any thing which sound rules required it should have. *Ib.*
11. If there was known and in practical use an apparatus, which, if applied to an engine, would prevent the emission of sparks, the defendant was negligent if it did not avail itself of such appliance. But it was not bound to use every possible prevention which scientific skill might have suggested, nor to adopt an untried machine. *Ib.*
12. There must not only exist scientific skill to make, but there must have been in practical use, and known, locomotives consuming their own sparks, before a railway company can be charged with negligence in not employing them. *Ib.*
13. The plaintiff, a passenger in a railway car, delivered to the messenger of a baggage express two checks for two packages of baggage which the messenger agreed to transport from the railway terminus to another point, and deliver to plaintiff. At the time of taking the checks, the messenger entered their numbers on a printed form, purporting to be a receipt containing certain stipulations limiting the company's liability and handed it to the plaintiff. The car was dark, so that it would have been impossible to read the stipulations, and plaintiff did not read them. The stipulations were in small print, but a direction to read this receipt was in conspicuous print. *Held*, that the plaintiff was not presumed to know the contents of the receipt, or to assent to them. *Blossom v. Dodd*, 701.
14. Checks for baggage are not of the character of bills of lading, and, like instruments, and persons receiving them, are not presumed to know that they contain the terms upon which the property is carried. *Ib.*

See SALE AND DELIVERY, 1, 2.

CONDITIONAL SALE.

H. sold and delivered a house car to P., under a bill of sale providing that "said H. reserves the right from said car until fully paid, but said P. shall have the use of said car from date; should said P. fail to comply with this agreement, said H. shall have the right to take said car from said P. as his

property." *Held*, that it was a conditional sale, and that the car might be taken under execution by P.'s judgment creditors. *Haak v. Linderman*, 612.

CONSIDERATION.

See CONTRACT, 8; CONVEYANCE; PROMISSORY NOTE, 4.

CONSTITUTIONAL LAW.

1. Taxation in aid of railroads owned and operated by private individuals or corporations is unconstitutional, and an act of the legislature authorizing county orders to be issued in aid of a railroad, and taxes to be levied for the payment thereof, on condition that the consent of the majority of the people should be manifested by ballot, and the railroad should be brought to a specified state of completion, is void. *Whiting v. The Sheboygan & Fond du Lac R. R. Co.*, 80.
2. The act of congress of March 2, 1867, in so far as it gives a non-resident plaintiff the right to remove a cause from the State to the federal courts, is unconstitutional. (DIXON, C. J., dissenting.) *Whiton v. The Chicago & Northwestern R. R. Co.*, 101.
3. The charter of a city conferred upon the city council power to cause the improvement of streets at the cost of the owners of lots fronting such improvements, and provided that when any street had been once so improved it should be thereafter kept in repair at the expense of the city. Afterward a new charter was granted to the city, which gave the council power to improve all streets by original construction or re-construction at the exclusive cost of adjacent owners. Acting under this last charter the council caused a street, which had been improved under the first charter at the cost of the adjacent lot owners, to be re-paved, and assessed the cost on adjacent owners. *Held*, that the provision in the first charter, "that after the first improvement, repairs were to be made at the expense of the city," was not a contract, and that therefore the second charter and the proceedings under it were constitutional and valid. *Bradley v. McAtee*, 809.
4. The act of congress of 1864, chapter 173, section 94, which authorizes persons who before its enactment had made contracts without other provision therein for the payment of duties subsequently imposed on articles to be delivered under them, to recover from the purchaser a sum equivalent to the duties so imposed if the same had not been previously paid by him, is constitutional; and such sum may be sued for and recovered in either a federal or State court. *Ammidown v. Freeland*, 359.
5. By the statute of June, 1868, chapter 349, of Massachusetts, entitled "An act concerning the taxing of bank shares," it was provided that the shares in national banks owned by non-residents of the commonwealth shall be assessed to the owners thereof in the cities or towns where the banks are located; that the rate of taxation shall be the same as on other moneyed capital; that the value of such shares shall be omitted from the valuation upon which the rate is to be based, and that the act shall "apply to taxes assessed and collected for the present year in the same manner and to the same effect as if it had been in force on the first day of May." *Held*, that

the act was not unconstitutional, either as being in violation of the act of congress of 1864, chapter 106, section 47, and 1868, chapter 7, or as levying a tax in a disproportional manner, or as being retrospective in its operation. *Providence Institution v. Boston*, 407.

6. An act of the assembly authorizing a street already laid out and in good condition, to be taken and improved for a public drive or carriage-way, and providing that the expense of the improvements be assessed upon the property located on the street is unconstitutional, as imposing local assessments for improvements, which are for the general public benefit. (READ and WILLIAMS, *dissentients*.) *Hammett v. Philadelphia*, 615.
7. By a series of enactments the legislature of Pennsylvania prohibited the floating of saw-logs in the Susquehanna river, between the town of Northumberland and the Maryland State line, "without the same being rafted and joined together or inclosed in boats, and under the control, supervision and pilotage of men especially placed in charge of the same, and actually thereon," under penalty of forfeiture. *Held*, that these enactments were a valid exercise of the police power and the right of eminent domain, and not repugnant to the federal power "to regulate commerce with foreign nations and among the several States," nor a violation of a contract created by legislation between Maryland and Pennsylvania, to the effect that the Susquehanna should be a public highway to the Maryland line. *Craig v. Klins*, 686.

See MARITIME LIEN, 2, 3, 4, 5, 6.

CONTRACTS.

1. The plaintiff obtained a contract for building a school-house for the district of which he was a director, and took part in the proceedings of the board which let the contract. *Held*, that the contract was void, on the ground that it was against public policy to allow the plaintiff, while holding a fiduciary relation to the district, to place himself in an antagonistic position and obtain the contract for himself from the board of which he was a member. *Pickett v. School District*, 105.
2. A contract was made, the consideration of which arose from the following transaction: H., of Kentucky, drew and delivered to C., of the same State, an order addressed to E., of Texas, requesting him to pay money in his hands to T., also of Texas. The order was transmitted through the lines, and executed. *Held*, that this transaction was not a violation of the proclamation of the president of the United States, of August 16, 1861, prohibiting all commercial intercourse between the loyal and rebellious States, Kentucky being loyal and Texas disloyal, and that the contract supported by this transaction was valid. *Haggard v. Conkwright*, 297.
3. T. and others gave their promissory note to W. on consideration that W. would use his personal influence with a commanding general to secure the pardon or commutation of the sentence of T., who had been arrested by the military authorities of the United States, in 1865, on the charge of being a guerilla, tried at Louisville, convicted and sentenced to death. In an action on the note, *held*, that the consideration was valid, on the ground that the military courts had no jurisdiction of the person convicted. *Thompson v. Wharton*, 306.

4. The plaintiff brought an action against the defendant, an executor, for money had and received to plaintiff's use by defendant's testator, under an agreement made between plaintiff, the testator, and another, to operate in stock for the purpose of making a "corner," the money to be expended by the testator. *Held*, that the agreement was illegal and fraudulent, and that the plaintiff could not recover for any sums actually expended by the testator in the execution of the purposes of the agreement, although a recovery might be had for sums received but not thus actually expended. *Sampson v. Shaw*, 327.
5. By a statute of the State, the board of auditors of the town of O. were authorized to receive sealed proposals for the collection of town taxes, and to award such collection to the person offering the most favorable terms. The plaintiff and defendant both made proposals. At the time of doing so they made an agreement, that if either obtained the award, he would share the profits equally with the other. The defendant obtained the award and made certain profits. *Held*, that the agreement was contrary to public policy, and the plaintiff was not entitled to recover the stipulated share of the profits. *Atcheson v. Mallon*, 678.
6. The plaintiff, defendant, and two other parties, one of whom was an engineer in the employment of the State, upon the canals, entered into an agreement in the nature of a copartnership, to put in a bid for certain canal work. This agreement was forbidden by statute. The bid was put in, but before it was awarded, one H., who was a higher bidder for the same work, purchased the bid for \$400, giving his note therefor. It was afterward arranged that the plaintiff should collect the note, and that each of the parties interested should receive \$100 of the proceeds. Defendant was not paid. *Held*, that the original agreement of partnership being illegal the defendant could not enforce any of its unexecuted provisions, one of which was to divide the \$400. That the express agreement made for the collection of the note and the division of the money will not be enforced, it being only a promise to carry out the unexecuted provisions of the contract of partnership. *Woodworth v. Bennett*, 706.

See COMMON CARRIER, 1, 5, 6, 9; CONSTITUTIONAL LAW, 4; CORPORATIONS, 1; GOLD CONTRACTS; INFANTS; LORD'S DAY; REBELLION; RESTRAINT OF TRADE.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 2, 5, 7; RAILROAD COMPANY.

CONVERSION.

Certain coupons of United States bonds, belonging to S., had been stolen from him, and delivered by one who received them from the thief to H., and by him, acting as agent and in good faith without gross negligence, sold and turned into money, which he paid to the person from whom he received them. *Held*, that H. was not liable to S. for their conversion. *Spooner v. Holmes*, 491.

See HUSBAND AND WIFE, 2.

CONVEYANCE.

1. The defendant made a conveyance of land to the plaintiff, not actually including a certain lot of seventeen acres, which defendant had represented and plaintiff had been led to believe to be covered by the deed. By a proviso in the deed, plaintiff assumed the burden of maintaining a line fence, being induced to consent to the proviso by false representations of the defendant in regard to the amount of fence which his neighbors would be obliged to maintain. Part of the purchase-money for the land was paid in government bonds, the defendant agreeing to take them at par and pay the interest and premium, and there was a considerable sum due to the plaintiff thereon. By a bill in equity the plaintiff prayed that the defendant be compelled to convey the additional seventeen acres, to release plaintiff from the proviso and to pay the amount due on the bonds. *Held*, that the conveyance prayed for could not be decreed; that the remedy relating to the proviso and to the bonds was adequate at law; and that, as the plaintiff did not offer to rescind the whole contract, there was no remedy in equity. *Glass v. Hulbert*, 418.
2. The plaintiff, owning a piece of wild land, told the defendants that the premises should be theirs as long as they lived, and put them in possession of the same. The defendants occupied the premises for a number of years, and made extensive improvements upon them. *Held*, that the expenditures made upon permanent improvements constituted, in equity, a consideration for the promise of the plaintiff, and that the performance of the promise, although by parol, could be enforced in equity, and that an action of ejectment would not lie against defendants in possession. *Freeman v. Freeman*, 657.

CORPORATION.

1. A banking corporation was instituted under a statute which provided that no director or other officer of the bank should borrow any money from the bank, under penalty of fine and imprisonment. The president of the bank, who was also a director, borrowed a large sum of money from the bank, and afterward made an assignment of his property for the benefit of his creditors, and, on an appeal from an order allowing the claim of the bank under the loan, *held*, that the contract arising from the loan was enforceable, though prohibited by statute, and that the lien of the bank on property in the hands of the assignee was good to the extent of the loan. *Lester v. Howard Bank*, 211.
2. Some of the stockholders of a manufacturing company transferred four hundred shares to C., to be held by him "for the benefit of the corporation," and, at an election of officers, C. voted on these four hundred shares, whereupon the election was claimed by the persons having the highest number of votes. *Held*, that a mandamus would issue to compel the surrender of the offices to the persons having the highest number of votes, after excluding the four hundred. *American Railway Frog Co. v. Haven*, 877.

See EVIDENCE; PENALTY; TRANSFER OF CAUSES; PROMISSORY NOTE, 1 &

COSTS.

See INSOLVENT ESTATE.

DAMAGES.

See COMMON CARRIER, 8; SEDUCTION, 1; VENDOR AND VENDEE.

DAMNUM ABSQUE INJURIA.

See MUNICIPAL CORPORATIONS, 9.

DEDICATION.

See HIGHWAY, 1.

DEED.

- 1 A grantee under a conveyance with a restriction that none but a dwelling-house shall be erected on the premises, and that the "building, when erected, is not to be occupied for the purpose of carrying on any offensive trade or calling whatever," cannot use a part of a dwelling, so erected, as a grocery store. *Dorr v. Harrahan*, 398.
- 2 A deed of land, reciting a pecuniary consideration, and to take effect after the decease of the grantor, upon condition of certain services to be rendered him, may be maintained as a covenant to stand seized to the grantee's use, notwithstanding the absence of the relation of blood or marriage between the grantor and grantee. *Trafton v. Hawes*, 494.

See CONVEYANCE.

DEL CREDERE AGENT.

A *del credere* agent collected a bill of goods due his principals from a customer, and placed the amount to his own account with his bankers, and purchased of them a gold draft, which he caused to be made payable to his own order without reference to his character as agent, and, after indorsing it to his principals or their order, transmitted it to them in payment not only of the price of the goods sold to the customer, but also of a balance due from himself. The draft was dishonored and returned to the agent who treated the loss as his own and promised to send another draft, and in the mean time unsuccessfully solicited payment of the draft from the drawers to himself and then caused himself to be made a preferred creditor of the drawers, who had failed. In an action by the principals against the agent, to recover the amount of the draft, *held*:

1. That the contract resulting from the *del credere* character of the agent was not entirely discharged in the payment of the money by the customer to the agent.
2. That the agent was further liable, after the receipt of the money either by virtue of the *del credere* commission, or by his indorsement of the draft, although he had used ordinary diligence in transmitting the money.
3. That the promise of the agent to assume the debt after the dishonor of the draft was not valid unless he had full knowledge of the neglect of his principals in making demand, and in giving notice of the dishonor of the draft.

The relation of a *del credere* agent to his principal is that of debtor and creditor, and he is bound absolutely to see that his principal is paid. *Lewis Brothers v. Brehme*, 190.

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DELIVERY.

See SALE AND DELIVERY.

DEVICES.

See WILLS.

DIVORCE.

When the wife is possessed of an organic defect rendering coition imperfect and conception impossible, which defect existed at the time of the marriage and is conceded to be permanent, the marriage contract is void *ab initio*, on the ground of impotency, and a deed of separation voluntarily entered into by the husband and wife will not bar a subsequent application by the husband for a divorce *a vinculo* on the ground of such impotency. *J. G. v. H. G.*, 188.

DRAFT.

A bank discounted a draft on the faith of a letter of credit from the drawee and the draft was unavoidably lost in the course of transmission to the special indorsee of the bank. *Held*, that the bank could recover of the drawee in equity, on offering indemnity against the draft. *Savannah National Bank v. Hastings*, 878.

See PAYMENT, 2.

DRAINAGE.

See MUNICIPAL CORPORATION, 4.

DROP LETTER.

See PROMISSORY NOTE, 6.

DOWER.

See HUSBAND AND WIFE, 8; LUNATED.

EASEMENTS AND SERVITUDE.

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ENTRY OF FORECLOSURE.

See INSURANCE, 10.

EQUITY.

See CONVEYANCE; MORTGAGE.

EQUITY OF REDEMPTION.

See MORTGAGE.

EVIDENCE.

1. In an action by the broker against his customer, to recover, in case of loss in purchase of stock, the letters of a correspondent in a neighboring city are incompetent as evidence to prove the purchase and subsequent sale of the stock in obedience to orders from the broker. *Rosenstock v. Torney*, 125.

2. In an action under an act of the legislature, which act had been signed by the governor, certified under the great seal, and published as required by the State constitution, evidence was offered to show that the act had been changed by a mistake of the engrossing clerk. *Held*, inadmissible. *The Mayor of Annapolis v. Harwood*, 161
3. A certified copy from the registry, of a deed purporting to have been executed under the authority of a corporation by its president, is admissible in evidence without proof that the president had authority to execute it. *Chamberlain v. Bradley*, 331.
4. A sworn copy of a letter-press copy of a lost letter is competent as evidence of the contents of the letter, without producing the letter-press copy. *Goodrich v. Weston*, 469.
5. Parol evidence is admissible for the purpose of applying the terms of a written contract to the subject-matter. *Sweat v. Shumway*, 471.

See HIGHWAY, 1; PRIVILEGED COMMUNICATIONS; PROMISSORY NOTE, 1.

EXECUTION.

See CONDITIONAL SALE.

FALSE IMPRISONMENT.

An officer attached an attorney's desk and library of not more than \$200 in value, situated in the office of a broker, kept possession of the office for more than five hours of daylight, and then, after demanding and being refused a key, obtained one from a locksmith for the purpose of continuing his possession. The broker caused another lock to be put on the door, and after giving the officer notice to remove the goods immediately, and his refusing to do so, locked him in for the night. In an action for assault and false imprisonment, *held*, that the officer delayed removing the goods for an unreasonable length of time; that he abused his authority and became a trespasser, and that he could therefore not recover. *Williams v. Powell*, 896.

FEDERAL COURTS.

See TRANSFER OF CAUSES.

FORFEITURE.

A forfeiture without notice to the owner of the property, and without an opportunity of being heard on the question of the owner's culpability, is contrary to the provision in the bill of rights, that no one shall be deprived of his property unless by the judgment of his peers, or the laws of the land. *Craig v. Kline*, 636.

FREE PASS.

See COMMON CARRIER, 4.

GIFT.

1. The declaration of an intention to give, followed by delivery of the subject-matter of the intended gift to a bailee, for the benefit of the donee, constitutes a perfected gift. *Gardner v. Merritt*, 115.

2. A grandmother of several grandchildren having stated that "she was going to put money in the bank for her grandchildren," deposited various sums of money in the savings bank to the credit of the grandchildren, and, in accordance with the by-laws of the bank relative to deposits by parents and guardians, caused them to be made subject to her own order or that of her daughter. On the death of the grandmother, her own daughter became executrix of the estate, and withdrew said sums of money from the savings bank and administered them as part of the estate. In a suit to obtain an accounting of the moneys so withdrawn and administered, *held*, that the deposits were perfected gifts, only liable to be withdrawn for the exclusive benefit of the donees, the grandchildren. *Id.*

GOLD CONTRACTS.

1. The holders of certain gold warrants accepted payment thereof in treasury notes under protest, and surrendered the warrants. *Held*, that the payees could not afterward recover the difference between the value of the notes and gold coin. *Gilman v. County of Douglas*, 237.

HABEAS CORPUS.

See JURISDICTION.

HIGHWAY.

1. The plaintiff constructed a road through his own land, which he permitted the public to use freely for two or three years, and subsequently closed it by fences. In an action against the pathmaster for removing the fences, it was *held* that, where the intention of the owner to dedicate the road to the public is evident, no formal or official acceptance is requisite to constitute a highway by dedication. Evidence of the declarations of the owner explanatory of his intentions, both before and after the opening of the way, is admissible. *Buchanan v. Curtis*, 23.
2. Objects within the limits of a highway, naturally calculated to frighten horses of ordinary gentleness, may constitute such deficiencies in the way as to render the town liable, even though so far removed from the traveled path as to avoid all danger of collision. An instruction to the jury to the contrary of this rule is erroneous. *Foshay v. Glen Haven*, 73.
3. In an action against a city for injuries sustained by the plaintiff by slipping upon ice which had formed on the sidewalk in consequence of water dripping from a defective conductor, or the eaves of a building, the jury were instructed that the icy condition of the sidewalk, if produced from the operation of general causes, as by reason of atmospheric changes, would not constitute a defect for which the city would be liable; but that the same condition of the sidewalk, if produced from some local cause, as by a defective sewer, or by water dripping from the edge of a roof, might constitute a defect for which the city would be liable; that the question of defect depended upon whether the condition of the sidewalk was produced by general causes affecting a whole neighborhood alike, or by some special local cause affecting a particular portion of the sidewalk. *Held*, that the distinction thus made was error, and that the question of defect must be deter-

mined by the condition of the sidewalk itself, in respect to that particular which is alleged to have caused the injury. *Billings v. Worcester*, 460.

See BRIDGES; NEGLIGENCE, 1, 2.

HOTEL KEEPER.

See INN KEEPER.

HUSBAND AND WIFE.

1. A wife is not a "relation" within the meaning of a statute which provides that, "where a devise of real or personal estate is made to a child or other relation of the testator, and the devisee dies before the testator, leaving issue who survive the testator, such issue shall take the estate so devised in the same manner as the devisee would have done had he survived the testator." *Esty v. Clark*, 320.
2. Where goods are stolen from a shop and sold, by the thief, to a wife, in the absence of her husband, and the wife converted them to her personal use as articles of dress, *held*, that she, as well as the husband, was liable for the goods. *Heckle v. Lurvey*, 366.
3. The wife's inchoate right of dower, in lands, which were mortgaged at the time her husband became the owner thereof, ceases at the sale of the lands, during the life-time of the husband, under a power in the mortgage, and she is not entitled to a share in the surplus. *Newhall v. Lynn Five Cents Saving Bank*, 387.

INCOME.

See TRUSTS.

INDORSER,

See PROMISSORY NOTE, 6, 7, 9.

INFANT.

The defendant, while an infant, purchased certain mortgaged real estate, and in the deed to her covenanted to pay the mortgage. She thereafter sold the real estate at an advanced price. Some years after she became of age, the mortgage was foreclosed by action, in which she was made a party and appeared. A judgment thereon, for deficiency, was entered against her grantor. *Held*, that the covenant was voidable on the part of the defendant, and that a retention of the fruits of her sale after she became of age was not an act in affirmance of the contract, nor was the appearance in the foreclosure suit an act tending to ratify her obligation. *Walsh v. Powers*, 654.

See RAILROAD COMPANY, 2.

INJUNCTION.

See DEED.

INN KEEPER.

By an act of the legislature of 1855, it was provided that "whenever the proprietor or proprietors of any hotel shall provide a safe in the office of such hotel or other convenient place for the safe keeping of any money, jewels

or ornaments belonging to the guests of such hotel, and shall notify the guests thereof, by posting a notice (stating the fact that such safe is provided, in which such money, jewel or ornaments may be deposited) in the room or rooms occupied by such guest in a conspicuous manner, and if such guest shall neglect to deposit such money, jewels or ornaments in such safe, the proprietor or proprietors of such hotel shall not be liable for any loss of such money, jewels or ornaments, sustained by such guest, by theft or otherwise." In action to recover the value of a gold watch, with the chain, seal and key attached, valued at \$350, and \$50 in money stolen from the plaintiff's room at defendant's hotel, during the night, *held*, that if the notice was posted according to law, and the safe provided, the plaintiff could recover for the property stolen, but not for the money. *Romaly v. Leland*, 728.

IMPOTENCY.

See DIVORCE.

INSOLVENT'S ESTATE.

Where a trustee of an insolvent's estate refuses to initiate proceedings to annul a fraudulent conveyance made by the debtor, and the creditors are thereby compelled to institute such proceeding in their own behalf, and the conveyance is set aside, counsel fees are a proper charge against the trust fund. *In the matter of the Insolvent estate of Conrad Leiman*, 182.

INSURANCE.

ACCIDENT.

1. The plaintiff's intestate held a policy by which defendant agreed to pay a certain sum in event of intestate's death, etc., "when caused by any accident while traveling by public or private conveyances provided for the transportation of passengers." The defendant in prosecuting a journey, while passing on foot by the usual route from a steamboat landing to a railway station about seventy rods distant, slipped and fell, from which she received injuries causing death. *Held*, that such injury and death were within the terms of the policy. An injury received while necessarily walking in the actual prosecution of a journey is received while traveling in a public conveyance within the meaning of the policy, when such walking is the actual and necessary accompaniment of such travel. *Northrup v. Railway Passenger Assurance Co.*, 724.

FIRE.

2. The defendants issued a policy of insurance on plaintiff's factory upon a written application, signed by him, wherein it was set forth, in answer to printed interrogatories, that the premises were worked during certain hours, that a night-watchman was always on duty, and that there was a force pump on the premises for putting out fires, and that it was always in condition for immediate use. The defendant's agent who effected the insurance was informed by the plaintiff at the time, that the factory was not run during the winter season, and that there was then no watchman kept, nor pump ready for use. The agent himself filled up the application, and wrote down such portions of plaintiff's answers as he considered material. The policy

provided that "the company will be responsible for the accuracy of surveys made by its agents." The factory having been burned during the winter season, the company denied its liability on the ground that the undertaking of the plaintiff regarding watchman and pump had not been complied with. *Held*, that the defendants were liable. *May v. The Buckeye Mutual Ins. Co.*, 76.

3. The Baltimore Fire Insurance Co. issued a policy of insurance to a railway company, insuring "two Murphy & Allison passenger cars, *contained in* car house No. 1, and engine J. H. Nicholson, *contained in* engine-house No. 2." One of the cars and the engine, described in the policy, having been subsequently damaged by fire while making a regular trip on the line of the railway, in an action on the policy, *held*, that the words "contained in" were designed to restrict the risk to the property, while actually inside of the car and engine-houses, specified in the policy; and that the railway company could not recover for the loss. *The Annapolis, etc., R. R. Co. v. Baltimore Fire Insurance Co.*, 112.

4. The Potomac Fire Insurance Company issued its policy of insurance to B., stipulating therein that the company would pay all loss to the property insured resulting from fire, and not exceeding the amount specified, during one year from the date of the policy. There were further provisions in the policy, expressly providing that the company should not be held liable under the policy until the premium in full was actually paid, and that, if the premium was not paid within fifteen days from the date of the policy, it should be null and void. A loss by fire occurred to the property covered by the insurance after the delivery of the policy, but before the premium was paid and before the expiration of the "fifteen days." The insured, while the fifteen days were still unexpired, tendered the amount of the premium and claimed indemnity for the loss. *Held*, that actual payment of the premium, not only within the "fifteen days" *but before loss*, was necessary to render the company liable under the policy, and that the holder, not having fulfilled the conditions, could not recover for the loss. *Bradley v. The Potomac Fire Ins. Co.*, 121

5. A policy of insurance against fire was issued upon the conditions, *that if* the interest of the insured in the property was a leasehold interest, or other interest not absolute, the company should be so informed at the time of contracting the insurance, or the policy would be void: and *that a sale or conveyance of the property, or an assignment of any interest in the policy without the consent of the company, would render the policy void.* The insured, at the time the insurance was negotiated, was the owner of an equity of redemption only, with possession of the property insured; but no mention of that fact was made. Subsequently, the insured entered into a contract for the sale of the property under which he received a part of the purchase-money, but continued in possession and held insurance policies for the benefit of the vendee. A total loss, by fire, of the property afterward occurred; and, in an action on the policy by the assignee of the insured, *held*:

1. That the interest of the insured as mortgagor was absolute, within the meaning of the policy, and no explanation of that interest was required before insurance.

2. That an executory contract for the sale of the premises did not violate the prohibition in the policy against sale or assignment.
3. That the insurance company, on payment of the loss, could not be subrogated to the rights of the insured, *pro tanto*, under the contract of sale. *The Washington Fire Ins. Co. v. Kelly*, 149.
6. A member of a mutual insurance company held a policy on buildings and property containing a provision that the buildings insured and the land on which they stood became pledged, by the insurance, to the company, and that the company should have a lien thereon for the premium. The insured died in debt for the premium, having devised the property insured, with the land, to his widow, who conveyed it to Mathers, the latter not having notice of the lien of the insurance company. *Held*, that the lien of the policy could not be enforced after the property had passed into the hands of a *bona fide* purchaser. *Kentucky Farmers' Mutual Ins. Co. v. Mather*, 286.
7. When the property is distant and its *status* unknown to either party an insurance against fire will bind the insurer for a loss occurring before the date of the contract, if such appears, either from the policy or from attending circumstances, to have been the intention of the parties. *The Security Fire Ins. Co. v. Kentucky Marine Ins. Co.*, 301.
8. An oral contract to issue a policy of insurance is binding and may be specifically enforced or the court may award damages the same as in an action on an executed policy. *Ib.*
9. A provision in a company's charter requiring that "all policies and contracts of insurance * * * shall be subscribed by the president," relates only to executed insurances, and does not abridge the common-law right to make an oral executory contract for insurance. *Ib.*
10. A policy of fire insurance on personal property contained a proviso that "if the title of the property is transferred or changed" "this policy shall be void; and the entry of a foreclosure of a mortgage" "shall be deemed an alienation of the property, and this company shall not be holden for loss or damage thereafter." The insured property was mortgaged at the time the insurance was effected, and notice of foreclosure had been duly served, certified and recorded when the fire occurred. *Held*, that the policy was avoided. *McIntire v. Norwich Ins. Co.*, 458.
11. One of the defendants procured insurance with the plaintiffs upon certain buildings owned by him. By the terms of the policies the loss was payable to the owner of a mortgage on the insured premises. The owner of the mortgage was protected against forfeiture of insurance by reason of the acts of the owner of the property, and the insurers were, in case of payment of insurance to mortgagee, to be subrogated to his rights. The policies also provided that, in case of any change of title in the property insured, they should be sold. Subsequently to effecting insurance, the defendant sold and conveyed the premises insured, soon after which they were destroyed by fire. *Held*, that the owners of the premises could not have recovered upon the policies, and that they were not entitled to have the payment of the amount insured by the insurers to the owner of the mortgage applied in satisfaction of the mortgage. *Springfield Fire Ins. Co. v. Allen*, 711.

LIFE.

12. In July, 1857, W., a resident of Virginia, procured from the defendants an insurance upon the life of S., his debtor. The defendants were an insurance company organized under the laws of New York, and the insurance was effected through their agent in Richmond. The policy provided that the risk should determine if the premium was not paid when due; also, that no payments of premiums should be binding on the company unless the same was acknowledged by a printed receipt, signed by an officer of the company. The premiums were paid to the agent, and receipts given, signed by an officer until July, 1861, when the premium was paid, but only the receipt of the agent given. In July, 1862, the premium was tendered when due, to the agent, who refused to receive it, on the ground that the company had directed him that the premiums must be paid in New York. S. dying shortly after, this action was brought on the policy. *Held*, that the breaking out of the war did not annul the contract between the parties, nor revoke the authority of the agent; that the company had no power to require payment of premiums to be made in New York; that by neglecting to supply their agent with printed receipts, signed by an officer, the company had waived the provision in the policy making such receipts evidence of payment; and that, therefore, the company were liable for the amount of the insurance, less the last premium, which had not been paid. *The Manhattan Life Ins. Co. v. Warwick*, 218.
8. The New York Life Ins. Co. issued its policy to C., a resident of Virginia, on the life of her husband, in 1858, containing a provision that, if the yearly premiums were not paid on or before the several dates of payment therein mentioned, the policy should cease and the company should not be liable for any part of the sum insured. The husband died in 1864, being after the beginning of the civil war, leaving the premiums for 1862, 1863 and 1864 unpaid, the agent of the company in Virginia having refused payment for these years. *Held*, that the civil war did not dissolve the contract of insurance; that the non-payment of the three last premiums, in view of the state of war between the north and south, did not avoid the policy, and that C. could recover the sum insured, less the aggregate amount of the three unpaid premiums. *New York Life Ins. Co. v. Clopton*, 290.
24. A life insurance policy was issued to plaintiff's decedent in April, 1866, expressed to be made in consideration of a premium, already paid, and of a like sum to be annually paid during the continuance of the policy, and providing that the policy should "not take effect until the premium was paid," and that the policy should be forfeited "in case any premium due upon the policy should not be paid at the date when payable." The first premium was paid partly in cash and partly in promissory notes, but the notes were not paid, and the insured died March, 1867. *Held*, that the policy had taken effect, and that the non-payment of the notes did not bar plaintiff's recovery because the "forfeiture" clause referred to premiums after the first. *McAllister v. New England Mut. Ins. Co.*, 404.
15. Where a proviso in a life insurance policy is, that it shall be void if the assured "shall die by suicide," and the assured took a rope and hung him-

self, there can be no recovery on the policy, although the act of self destruction was committed under the influence of insanity, in the absence of evidence proving delirium or madness, or that the act was involuntary. *Cooper v. Massachusetts Life Ins. Co.*, 451.

MARINE.

16. A marine insurance company issued its policy on plaintiff's vessel, containing a clause as follows: "Prohibited from the river and gulf of St. Lawrence, Northumberland straits, or Cape Breton, and Black sea, between October 1 and May 1." The vessel was in one of the prohibited ports in March, soon after the insurance was effected, and was lost at sea many months afterward. *Held*, that the implied warranty of the clause contained in the policy had been broken, and plaintiff could not recover. *Odiens v. New England Mut. Ins. Co.*, 401.

INTERSTATE COMITY.

See PENALTY.

INTERSTATE TRAFFIC.

See REBELLION.

JURISDICTION.

1. The State courts have authority to inquire, upon a writ of *habeas corpus*, into the cause of detention of any prisoner held within the State by a military officer of the United States, and to order his discharge. *In re Turble*, 85.
2. A minor, under the age of eighteen, enlisted, declaring himself over eighteen years of age, but not swearing to the statement, and subsequently escaped, and was arrested as a deserter. On petition of the father of the recruit, a writ of *habeas corpus* was issued from a State court, and the prisoner discharged. *Held*, that the State court had jurisdiction. (DIXON, C. J., dissenting.) *Ib.*

See BANKRUPTCY, 1; CONSTITUTIONAL LAW, 4; MARITIME LIEN.

LACHES.

See PAYMENT, 2.

LIBEL.

The plaintiff sued the editor and the publisher of a newspaper, for an alleged libelous article appearing in their columns. The article contained a statement, with comments, of judicial proceedings instigated by J. to obtain a divorce from his wife on the ground of her adultery with plaintiff; and at the trial the judge charged the jury that, "taking the whole article together the petition for divorce, and the comments upon it, there can be no doubt that it is libelous and grossly so." *Held*, correct. *Pittock v. O'Neil*, 544.

LIEN.

See INSURANCE, 6, 7; MARITIME LIEN.

LIMITATION.

See WILLS, 1.

LORD'S DAY.

A and B. made a trade on the Lord's day, whereby A. sold B. a set of jewelry and B. gave in exchange a coat. A few days after B. returned the jewelry and demanded the coat, and, on refusal, brought action to recover its value *Held*, that the transaction being on the Lord's day was illegal and that the plaintiff could not recover. *Myers v. Meinrath*, 368.

LUNATIC

The committee of a lunatic widow cannot make an election for her between the provision made for her, in the will of her husband, and her dower at common law, without the sanction of the court. *Kennedy v. Johnson*, 650.

MARITIME LIEN.

1. A claim for labor upon the hull of a vessel, while yet in process of construction before launching, is not a maritime contract, and the United States admiralty courts have no jurisdiction for its enforcement. *Sheppard v. Steele*, 660.
2. A State statute, a portion of whose provisions give a lien upon vessels and furnish a means of enforcing it in cases of contracts not maritime, and as to which there is no admiralty jurisdiction, will be upheld even though such statute is unconstitutional and void in relation to particular cases covered by its terms. *Ib.*
3. The plaintiff performed blacksmith work on a vessel being built at a ship yard in this State. *Held*, that the New York statute, entitled "An act to provide for the collection of demands against ships and vessels," passed April 14, 1862, was not in conflict with the United States constitution or the judiciary act so far as it applied to a lien claimed by plaintiff. *Ib.*
4. The plaintiffs attached a sea-going vessel, under the New York law (chap. 482, Laws of 1862), upon a claim for wharfage. *Held*, that a demand for wharfage being a maritime demand, cognizable in the courts of admiralty a State statute attempting to confer a remedy for such a demand by proceedings *in rem* is void. *Brookman v. Hammill*, 781.
5. Any State law which attempts to provide for the enforcement of a maritime claim or contract by any but a common-law remedy infringes upon the exclusive jurisdiction of the federal courts, and is a clear violation of the federal compact. *Ib.*
6. But in so far as the State laws create lien and provide remedies for claims not maritime, over which the courts of admiralty have no jurisdiction, they are valid and operative. *Ib.*

MARRIAGE

See DIVORCE

MASTER AND SERVANT.

1. An employee of a railway company cannot recover for an injury sustained by reason of an alleged defective brake, unless it is shown that the company was negligent, either in providing the machinery which caused the injury, or in selecting the mechanics whose duty it is to keep it in good order. *Wonder v. The Baltimore and Ohio Railroad Co.*, 143.
2. A railway company is not bound to change its machinery in order to apply every new invention or supposed improvement in appliances; and an employee who consents to operate the machinery already provided by the company, knowing its defects, does so at his own risk. *Id.*
3. The plaintiff was a boy fourteen years old, employed in defendants' factory to tend machinery, and on the second day of his employment, while standing in his proper place, tending a drawing-machine, his left hand was caught in the cogs of a machine, standing in dangerous proximity, and badly injured. *Held*, that instructions to the jury embodying the following principles were correct: That, if plaintiff was of sufficient age and intelligence to understand the nature of the risk to which he was exposed, and had reasonable notice of the dangerous nature of the service which he was performing, the defendants were not liable; but that, if the defendants knew or had reason to know the peril to which plaintiff was exposed, and failed to give sufficient or reasonable notice of it, and if plaintiff, without negligence, from inexperience, or reliance upon the directions given him, failed to perceive or appreciate the danger, and was injured in consequence, the defendants were liable. *Coombs v. New Bedford Cordage Co.*, 506.
4. A. was the owner of certain premises, which he leased to B. Subsequently A. and his servant, C., attempted to enter upon the premises by force, and, in the conflict which ensued, C. shot B., who soon afterward died of the wound. In a civil action by the representatives of B. to recover, under the statute, damages for the wrongful killing of their intestate, the judge refused to charge that, "If the jury believe that C. fired the shot which caused B.'s death, with the premeditated design to effect his death, A. is not liable for his act." *Held*, error. *Fraser v. Freeman*, 740.

MEASURE OF DAMAGES.

See COMMON CARRIER, 3; RAILROAD COMPANY, 2; SEDUCTION; VENDOR AND VENDEE.

MILITARY POWER.

See JURISDICTION.

MILL-OWNER.

See RIPARIAN RIGHTS.

MISTAKE.

The defendant, located at New York, sent to plaintiff, located at Troy, for collection, a note payable at a bank about thirty miles from Troy. The note was not paid, and notice of non-payment, etc., was sent by mail to plaintiff and defendant. Defendant received the notice, and collected the amount of

the note from an indorser. Plaintiff did not receive notice, and, assuming the note to have been paid, forwarded its amount to defendant, who at once paid back the indorser. Subsequently, upon discovering that the note had not been paid, plaintiff claimed the amount paid to defendant. *Held*, that the plaintiff was entitled to recover the money paid under a mistake of fact; that the payment back to the indorser was not sufficient to excuse defendant, it having had, at the time of plaintiff's making claim, means to secure itself against loss. *Union National Bank v. Sixth National Bank*, 718.

See AUCTION SALE; PAYMENT.

MORTGAGE.

L. sold his premises to S., but remained in possession, under a lease from S., to expire on the 1st of April following, and took a mortgage on the premises from S., conditioned for the payment of \$4,000 purchase-money on or before the 1st of April, being the date of the expiration of the lease. At the expiration of the lease L. held over by virtue of the mortgage, payment of which was not tendered until after the time named, and then refused. *Held*, that a formal entry under the mortgage was not essential; that the unaccepted tender, after the time named for payment, did not terminate the estate of L. under the mortgage, nor extinguish the lien thereof; and that L. could not be ejected. *Shields v. Lozeau*, 256.

See RAILROAD COMPANY, 1.

MORTGAGE FORECLOSURE.

See MORTGAGE.

MORTGAGOR AND MORTGAGEE

See INSURANCE, 5.

MUNICIPAL CORPORATION.

1. Where a municipal corporation is proceeding to drain its lands by the construction of artificial channels in the direction of land adjoining the corporation, to the permanent injury of such adjoining land, the owner thereof may restrain the construction of such channels by injunction. *Pettigrew v. Evansville*, 50.
2. A municipal corporation can acquire the right to turn a stream of water upon the lands of another, to the injury thereof, only by an exercise of the power of eminent domain. *Ib.*
3. In an action against a city to recover for personal injuries, it appeared that the plaintiff, while walking across a public common upon a footpath which had been prepared and cared for by the city, and used by the public for more than twenty years, fell into a deep excavation made by the direction of the city in the course of repairing a building used and rented by the city, standing within the common. The excavation was carelessly left unguarded by the servants of the city employed in the work of repairing the building. *Held*, that the city was liable, although the path was not a

highway by the law of Massachusetts, on the ground that the city, like a private owner, was liable for injuries caused by the negligence of its servants, to a person coming on grounds under its control, rightfully and by an implied invitation and license. *Oliver v. Worcester*, 485.

4. A public bridge was carried away by an extraordinary freshet, and lodged in the stream in the land of L., where it was allowed to remain for some time, obstructing the flow of water and greatly damaging L.'s adjacent land and trees. *Held*, that, in the absence of evidence of any insufficiency in the construction or fastenings of the bridge, L. could not recover of the town. *Livesey v. Philadelphia*, 578.
5. In an action by contractors for services performed in changing the route of a public road by direction of the supervisors, it appeared that the supervisors had no authority to change the route, but that the contractors had no knowledge of this want of authority. *Held*, that the town was liable. It seems that the town has a remedy over against the supervisors. *Oest v. Deerfield Township*, 605.

See HIGHWAY, 8.

MUTUAL MISTAKE.

See PAYMENT, 1.

NATIONAL BANKS.

A banking association organized under act of congress of 1864, chapter 106, can be sued in a State court, only in the city or county where it is located. *Orecker v. Marine National Bank*, 836.

See CONSTITUTIONAL LAW, 5.

NEGLIGENCE.

1. The plaintiff, while passing along a highway, was injured by a mass of ice and snow falling upon her from the roof of defendants' building. In an action to recover damages, *held*, that the defendants were liable, although the building was occupied by tenants who had covenanted to keep the premises in repair, as it did not appear that the roof was under their control. *Shipley v. Fifty Associates*, 346.
2. In an action by the plaintiff for injuries received by her while walking on the sidewalk in a city, in consequence of the alleged negligence of defendants' servants in unloading merchandise, the plaintiff prayed for the following instructions: 1. "That the question for the jury was, whether the injury was occasioned entirely by the negligence or improper conduct of the defendants' servants, or whether the plaintiff herself so far contributed to the misfortune, by her own negligence or want of ordinary and common care and caution, that, but for such negligence or want of ordinary care and caution on her part, the misfortune would not have happened; that, in the first case, the plaintiff would be entitled to recover, and, in the second, she would not." 2. "That mere negligence, or want of ordinary care or caution, will not disentitle the plaintiff to recover, unless it be such that, but for that negligence, or want of ordinary care and caution, the

- misfortune could not have happened, nor if the defendants might, by the exercise of care on their part, have avoided the consequences of the neglect or carelessness of the plaintiff." *Held*, that the instructions prayed for did not embody the correct rule of law in cases of negligence; but that the rule was, that "whenever there is negligence on the part of the plaintiff, contributing directly, or as a proximate cause, to the occurrence from which the injury arises, such negligence will prevent the plaintiff from recovery; and the burden is always upon the plaintiff to establish either that he himself was in the exercise of due care, or that the injury is in no degree attributable to any want of proper care on his part." *Murphy v. Deane*, 390
- 2 The defendant's steamer *St. John*, in attempting to pass a grounded tow belonging to the plaintiff, instead of taking the ordinary channel, which was on the west side of the tow, went to the east side, the pilot supposing that the channel had changed. The pilot knew that the tow was aground. *Held*, that the pilot was guilty of negligence, and the owners of the *St. John* liable for damage done by collision with a vessel belonging to the tow. *Austin v. N. J. Steamboat Co.*, 668.
4. He was negligent, although the accident may have been caused by an obstacle which had been recently and suddenly formed and could not be seen by him. A party cannot avail himself of the defense of "inevitable accident," who, by his own negligence, gets into a position which renders the accident inevitable. *Ib.*
- 5 The *St. John*, before reaching the tow, signaled that she intended to go to the east. No answer was made by those on the tow, though it had been grounded by its pilot making a mistake similar to that of the pilot of the *St. John*, and some of those in charge had sounded and discovered that the channel had changed. *Held*, that those managing the tow were not guilty of contributory evidence. *Ib.*
- 6 There was no legal duty on the part of the tow to either signal or impart any information as to the channel to the *St. John*. A steamer with full control of its machinery, desiring to pass a vessel, whether stationary or moving, must do it on its own responsibility, and is bound to select its route at its peril. *Ib.*
- 7 Plaintiff's intestate, while endeavoring to rescue a child from being run over by an approaching railway train, was himself struck by the train and so injured that he died. *Held*, that it was proper to submit to the jury the question, whether the negligence of the deceased contributed to the injury. *Eckert v. Long Island R. R. Co.*, 721.
8. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. Although an exposure to injury, for the purpose of saving property, is negligence, for the purpose of saving human life, it is not so, unless such as to be regarded rash or reckless. *Ib.*

See COMMON CARRIER, 4, 5, 9; MASTER AND SERVANT; MUNICIPAL CORPORATIONS, 8; RAILROAD COMPANY, 2.

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PAVEMENT.

See CONSTITUTIONAL LAW, 2, 3.

PAYMENT.

1. The defendants who were indebted to the plaintiffs tendered the note of third parties, which was accepted in payment of the indebtedness. At the time of such acceptance the makers of the note were insolvent, but both plaintiff and defendant were ignorant of the fact. *Held*, no payment and that plaintiff was entitled to recover the amount of indebtedness for which the note had been given. *Roberts v. Fisher*, 680.
2. The defendants, a firm in Buffalo, who were indebted to the plaintiff's firm in New York, forwarded by mail a draft on J. K. P. & Co., a business house in New York. The plaintiff, about half-past one on the day of its receipt, presented the draft to J. K. P. & Co., and received that firm's check for the amount. J. K. P. had funds in the bank on which the check was issued and the check would have been paid if it had been presented that day. The check was deposited by plaintiff in their own bank, and it did not reach the other bank until twelve o'clock the next day, and after J. K. P. & Co. had failed. *Held*, that the plaintiffs were guilty of laches in failing to present the check on the day it was received, and the defendants were released from liability for their indebtedness. *Smith v. Miller*, 690.

See BANKRUPTCY, 4, 7; MISTAKE.

PENALTY.

The provisions of a statute of Pennsylvania limited the amount of the debts and liabilities (not including capital stock) of certain companies to the amount of their capital actually paid in, and further provided that "if any debts or liabilities shall be contracted exceeding the said amount, the directors and officers contracting the same, or assenting thereto, shall be jointly and severally liable, in their individual capacities, for the whole amount of such excess, and the same may be recovered by action of debt as in other cases." In an action to recover for a violation of this statute—*Held*, that the liability so created was in the nature of a penalty, and was not enforceable by action outside of the State which enacted the law. *First National Bank v. Price*, 204.

PERPETUITIES.

See WILL.

PRINCIPAL AND AGENT.

Defendant's agent, in procuring plaintiff's promissory note, signed a receipt in the name of his principal, containing an undertaking that the note should be protected at maturity. He was not authorized to sign such a receipt; but defendant used the note in his business, and plaintiff was obliged to pay it at maturity. *Held*, that defendant was liable on the contract contained in the receipt. *Mundorf v. Wickersham*, 581.

See DEL. CREDERE AGENT.

PRIVILEGED COMMUNICATIONS.

Where a party offers himself as a witness, he cannot refuse to answer questions on cross-examination, as to any conversations with his counsel. *Instants of Woburn v. Henshaw*, 888.

PROMISSORY NOTE.

1. A promissory note read as follows: "Four months after date, we, the president and directors of the Dulaney's Valley and Sweet Air Turnpike Company, of Baltimore county, promise to pay to William F. Pierce, or order, one thousand dollars with interest, for value received;" and was signed by C. T. H., "president," J. N. H. and J. G. D., "directors," and E. R. S., "secretary." In an action to recover on the note, *held*, that parol evidence was admissible to show that the drawers of the note signed it as agents of the company and not as individuals, and that the note was accepted as the note of the company. *Haile v. Peirce*, 189.
2. Where a promissory note appeared on its face to have been originally dated February, 1868, and to have been afterward changed to 1869, by making the figure 9, over the figure 8, *held*, that if the alteration was made by the holder, after the execution and delivery of the note, in order to correct a mistake and make the note conform to the intention of the parties, such alteration did not invalidate the note, even if the signer had no knowledge of such subsequent alteration. *Duker v. Frans*, 814.
- b. The note of a manufacturing corporation, in the hands of a holder, in good faith, for value, who took it before maturity, and without knowledge that

the maker had not received full consideration, can be enforced against the corporation, although it was made as an accommodation note. *Monument National Bank v. Globe Works*, 822.

4. Where the consideration of a promissory note is a license to use and vend an invention regularly patented, the unprofitableness of the invention does not vitiate the note. *Nash v. Lull*, 485.
5. A promissory note not in terms payable at any place, but entitled to grace, was sued upon by the service of a writ at a quarter past six P. M., on the last day of grace, no demand of payment having been made. *Held*, that the action was premature. *Estes v. Tower*, 489.
6. On the 10th of July, 1866, a bank received notice of the dishonor of a promissory note which it had discounted, and on the 11th, after the close of the business day, notified its immediate indorser by a drop letter, which he did not receive until the 12th, there being no system of carriers. *Held*, insufficient notice to charge the indorser. *Shelburn Falls National Bank v. Townsley*, 447.
7. A promissory note was signed by A., indorsed by C., and delivered to B., who took it away with him and soon returned it to A., stating that it should have been drawn "with interest," whereupon these words were added by A.'s assent and in C.'s absence. In an action against C. on the indorsement the note was introduced in evidence in its original form, the words "with interest" having been erased. *Held*, that C. was liable, as the alteration was not fraudulent, and the note had been restored to its original form. (SHARWOOD, J., *dissentiente*.) *Kountz v. Kennedy*, 541.
8. A sealed promissory note, with several sureties, was executed and offered by the maker to the payee, who refused to accept it unless the words "interest to be paid semi-annually" were inserted. The maker thereupon, without the knowledge of the sureties, wrote the words in the note as required. *Held*, that the sureties were discharged from liability. *Neff v. Horner*, 535.
9. The defendant, who had indorsed a note, was, previous to its maturity, shown the note and told that the maker wanted it to remain another year. He was asked if he was willing, and he said he was willing to let it remain, and that it was a good note. *Held*, that this was a waiver of demand and notice; that the liability of the indorser became absolute on the maturity of the note, and no subsequent demand or notice was required. *Sheldon v. Horton* 669.

See PRINCIPAL AND AGENT.

RAILROAD COMPANY.

1. In pursuance of a statute authorizing a railroad company to mortgage "all or any part of their road, property, rights, liberties and franchises," the company executed and delivered a mortgage to certain persons, trustees, of "all the road, property, rights, liberties, privileges, corporate franchises, incomes, tolls and receipts, now held or hereafter to be acquired." *Held* that the mortgage was authorized by the statute and gave a valid lien on the engines, cars, furniture of stations, etc., required for the transaction of the business of the company, whether owned at the date of the mortgage or subsequently acquired. *Philadelphia, Wilmington & Baltimore Railroad Co. v. Woelpper*, 596.

8 A child, nineteen months old, strayed from its mother to the railroad track of the Pennsylvania Railroad Company, and was run over by a car, which had been detached from the engine and sent around a curve, on a slight down grade, unattended by a brakeman. The track where the child was injured ran through a lot which the public had been permitted, by the railroad company, to use freely. In an action to recover for the injuries received by the child, the judge took the question of negligence away from the jury and charged that no more than \$3,000 could be recovered, by reason of the limit in the act of assembly of 1868. The injury happened in 1864 and this action was commenced in 1866. *Held* (1) that, as in this case the negligence alleged consisted of a positive act of carelessness in sending a car around a curve out of sight, on a descending grade, at a place where persons might be expected to be, from the permissive use suffered by the company, the question of negligence was for the jury; (2) that the child was incapable of contributory negligence, and (3) that as the act of 1868 was retrospective as to this case, and, therefore, inoperative, full compensation should be rendered for the injury. *Kay v. Pennsylvania Railroad Co.*, 628.

See COMMON CARRIERS; MASTER AND SERVANT; NEGLIGENCE.

RAILROAD AID LAW.

See CONSTITUTIONAL LAW, 1.

RAILROAD CHARTER.

See RIPARIAN RIGHTS.

RATIFICATION.

See INFANT.

REAL ESTATE.

See STATUTE OF FRAUDS; DEED.

REAL ESTATE BROKER.

See BROKER.

REBELLION.

1 The defendants at the breaking out of the rebellion of 1861 were copartners doing business at Savannah, Ga., where one of them, named Wheaton, resided. Two of the defendants did business as copartners in New York, where they resided. On the 23d of August, 1861, the plaintiff's agent purchased of the Savannah firm a bill of exchange. It was drawn by Wheaton in the name of his firm on the New York firm of defendants. By an act of congress passed July 13, 1861, the president was authorized to declare certain districts in insurrection, and that thereupon all commercial intercourse should cease and become unlawful. On the 16th of August, 1861, the president by proclamation declared the district in which Savannah is situated in a state of insurrection. *Held*, that the drawing of the bill of exchange was illegal and void, and within the rule prohibiting contracts

with the enemy during war and no action could lie against any of the parties to it. *Woods v. Wilder*, 684.

2. The copartnership between Wheaton and the other defendants was dissolved by the war, and the defendants were not bound by the contract of Wheaton made after such dissolution. *Id.*

See CONTRACT, 2.

RESTRAINT OF TRADE.

- G. leased a dyeing and scouring establishment, in the city of Baltimore, for a term of years, to F. & D., partners, and at the same time sold them the good-will of the business, and covenanted never to enter into competition, directly or indirectly, with the lessees, in Baltimore, in the trade or profession of dyeing and scouring. The partnership between F. & D. was subsequently dissolved; D. became sole owner of the partnership interest; the lease expired, and D. removed next door and established himself in the regular business of dyeing and scouring. G. then made an arrangement with his son, by which the trade was re-established at the old stand, under the name of the son, the father being the real proprietor. On an application for an injunction, *held*, that the covenant was valid; that the dissolution of the partnership between F. and D. did not release the covenantor from his obligation to D.; and that the re-establishment of the business by G., under the name of his son, was in violation of the covenant, and could be restrained by injunction. *Guerand v. Dandelest*, 164.

RESPONDEAT SUPERIOR.

See MASTER AND SERVANT, 4.

REVENUE STAMPS.

See STAMPS

RIPARIAN RIGHTS.

1. A dam was constructed on a stream in a manner in nowise injurious or prejudicial, at the time of its erection, to a mill owner above; but, by reason of the unusual and unprecedented inflow of waters from the working of mines located on the stream above the mill, the obstruction became so great as to prevent the regular and efficient operation of the mill. *Held*, that the owner of the dam was not responsible for the injury thus occasioned, and that an injunction would not lie compelling him to lower the dam. *Prester v. Jennings*, 240.
2. A railroad company, in pursuance of alleged franchises embraced in their charter, constructed their track along the bank of a navigable river, below high-water mark, thus cutting off, without compensation, the riparian owners from the benefits incident to their property from its contiguity to the water. *Held*, that the title of owners of lands bordering on tide waters ends at high water mark; that below the ordinary high-water mark the title to the soil is in the State; and that the riparian owner has no rights beyond high-water mark, as against the State or its grantees. *Stevens v. Patterson and Newark R. R. Co.*, 269.

- 3 The question whether the legislature intended to grant the right of building a railroad on soil situated below high-water mark will be determined by an inspection of the charter. A specific grant is necessary to convey such right.

ROAD.

See HIGHWAY.

SABBATH.

See LORD'S DAY.

SALE.

See CONDITIONAL SALE; WARRANTY.

SALE AND DELIVERY.

1. M. & B., of Annapolis, directed A. G. & Co., of Boston, to send a cargo of one hundred and fifty tons of ice, and authorized them to get the freight as low as possible. The invoice was completed, shipment was made in the usual mode, and advices thereof were sent by letter. The cargo having been badly damaged in the passage, in an action by the vendors to recover the value of the ice, *held*, that the delivery to the common carrier transferred the title to the vendees, and that the vendors could recover the contract price. *Magruder & Bro. v. Gage*, 177.
2. If the contract of purchase be silent as to the person or mode by which the goods are to be sent, a delivery, by the vendor to a common carrier in the usual and ordinary course of business, transfers the property to the vendee *Id.*
3. Two sons, hotel-keepers, disposed of their interest in the hotel furniture and fixtures to their father. The father had been living in the hotel previous to the transfer. After the transfer, the sons remained, and one of them acted as superintendent. The dissolution of the partnership of the sons, and the transfer to the father, were published in two leading newspapers. Subsequently the furniture was levied on under a judgment obtained against the sons. *Held*, that not only the question of good faith in making the transfer, but also the question whether there was such delivery, actual or constructive, as to be notice to all third persons, and whether the possession taken by the vendee was exclusive, or concurrent with the vendors, was to be submitted to the jury. *McKibbin v. Martin*, 588.

SEDUCTION.

Where there is evidence, in an action for breach of promise of marriage, sufficient to establish the promise, the breach thereof, and the seduction of the plaintiff by the defendant subsequent to the promise, and also evidence tending to show that the seduction was procured by means of the promise to marry, the jury may consider the fact of the seduction as an aggravation of damages. *Sauer v. Schulenberg*, 174.

SIDEWALK.

See HIGHWAY.

SLANDER OF TITLE.

H. was prevented from making an advantageous sale of lands belonging to him and containing an iron ore mine, by the misrepresentations of P. to the proposed buyer, to the effect that an experienced iron manufacturer was of opinion that the iron mine was but a "pocket," or nest that would suddenly run out. *Held*, that H. could recover damages from P. in a suit in the nature of an action of slander for defamation of title. *Paull v. Halferty*, 518.

STAMPS.

1. An unstamped instrument is not absolutely void, in the absence of proof that the stamp was omitted with intent to defraud the revenue. *Green v. Holway*, 339.
2. The provisions in the United States Statutes of 1866, chapter 184, section 9, that no instrument, not duly stamped as required by law, shall be admitted or used in evidence in any court until a legal stamp shall have been affixed thereto, applies only to the courts of the United States. *Id.*
3. United States internal revenue stamps are exempt from all State and local taxation. *Palfrey v. City of Boston*, 364.

STATE AID.

See CONSTITUTIONAL LAW, 1.

STATUTE OF FRAUDS.

A mutual transfer of possession of lands, under a parol contract, which continues exclusive and undisturbed for 19 years, is a valid transfer of title and is not within the statute of frauds. *Moss v. Culver*, 601.

STATUTE OF LIMITATION.

1. The statute of limitations does not continue to run against the claims of creditors of an insolvent debtor after his application for the benefit of the insolvent laws, and before an audit and order of the court distributing the insolvent's estate. *In the matter of the insolvent estate of Conrad Leiman*, 132.
2. In bar of an action on a draft the statute of limitations was pleaded. It appeared that seven years had elapsed since the cause of action accrued, and that the defendant was a resident of New Jersey, but had done business ten hours each day in New York ever since. *Held*, that if a non-resident can be allowed any time under the statute of limitations, it must amount in the aggregate to six years of actual presence within the State in order to bar the action. *Bennett v. Cook*, 727.

STREET.

See CONSTITUTIONAL LAW, 8, 6; HIGHWAY.

SUBROGATION.

See INSURANCE, 5.

SUICIDE.

See INSURANCE, 15.

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SUNDAY.

See LORD'S DAY.

SURETIES.

See BANKRUPTCY, 8; PROMISSORY NOTE, 8.

TAXATION.

See CONSTITUTIONAL LAW, 1, 5; STAMPS, 8.

TITLE.

See SLANDER OF TITLE.

TOWNS.

See MUNICIPAL CORPORATION; HIGHWAY.

TOW-BOATS.

See COMMON CARRIERS.

TRANSFER OF CAUSES.

A non-resident insurance company doing business in a State, and accepting service of original process through its agents, in conformity to the laws of the State, is not thereby deprived of the right to a removal to the federal courts of an action commenced against it in the courts of the State by a citizen. *Knerr v. The Home Ins. Co.*, 26.

See CONSTITUTIONAL LAW, 8.

TRESPASS, COLOR OFFICIAL.

See FALSE IMPRISONMENT.

TRUST

By a will a trust was created, the capital consisting of stock in two corporations. The corporations afterward issued new stock to be taken by the stockholders, and the trustees, under the will, sold the right to subscribe for stock in one company and bought stock with their own money in the other company, and sold it at an advance. *Held*, that the profits belonged to the income and not the capital of the trust. *Wilbent's Appeal*, 585.

TRUSTEES.

See CONTRACT, 1.

TRUST FUND.

See INSOLVENT'S ESTATE.

TUGS.

See COMMON CARRIERS, 7.

ULTRA VIRES

See MUNICIPAL CORPORATION, 8.

USURY.

See ATTACHMENT.

VENDOR AND VENDEE.

V., the owner of a quantity of hay, knowing that white-lead paint had been spilt upon it, endeavored carefully to separate the damaged part from the rest, and supposed he had succeeded, and afterward sold the supposed undamaged part, without disclosing its condition, to F., whose cow ate thereof and died. *Held*, that V. was liable, and that the measure of damages was the value of the cow, if F. used all reasonable means to restore her. *French v. Vining*, 440.

WAR.

See INSURANCE, 12, 18; REBELLION.

WARRANTY.

The plaintiffs contracted to manufacture and deliver to the defendant "all the horn chains they manufacture." The chains manufactured and delivered were composed of round and oval links, the round links being hoof and the oval links being horn; and in an action to recover the contract price, *held*, (1) that the words "all the horn chains they manufacture" did not imply a warranty that the chains should be made wholly of horn, but that they should be the article known in the market as "horn chains;" (2) that the contract called for articles of a fair merchantable quality and of good workmanship, but not for articles of the first quality. *Steele v. Steamway*, 471.

WATER PRIVILEGE.

See RIPARIAN RIGHTS.

WILLS.

1. A will contained a provision by which certain leasehold property was devised to S., and, in the event of her death, "without leaving lawful issue or descendants," to W. *Held*, that the limitation over to W. was not void for remoteness; and that the words "dying without issue," in devises of estates less than freehold, signify "a dying without issue living at the death of the first taker." *Allender's Lessee v. Sussan*, 171.
2. By a will certain property was devised to C. and J. for life, and after their death to the "Infidel Society in Philadelphia hereafter to be incorporated, and to be held and disposed of by them for the purpose of building a hall for free discussion of religion, politics," etc. *Held*, (1) that this remainder, limited to a corporation thereafter to be created, was void, because there was no devisee competent to take at the time, and the possibility that there might be such a corporation during the particular estate for life was too remote; (2) that it was not valid as a charitable use which could be enforced and administered in a court of equity. *It seems* that such a corporation could not be formed under the law of Pennsylvania providing for the incorporation of societies for literary, charitable or religious purposes, and beneficial associations. *Zeisweins v. James*, 558.

3. A testator gave to his wife and daughter, or in case of the death of one of them, to the survivor, all his real estate during their lives, and in case of the death of the daughter, leaving lawful issue, his real estate was to descend to such lawful issue, their heirs and assigns forever. The will further proceeded: "In case my daughter shall die before her mother, leaving lawful issue, such issue shall enjoy and inherit their mother's right from the time of her death; but in case my daughter shall die, not leaving lawful issue, the executors shall sell, after the death of my wife, the real estate, and distribute the proceeds among my relatives hereinafter named." *Held* that the daughter did not take an "estate tail" which could be barred by conveyance in fee; but that she took an estate for life, with remainder to her children in fee, with an alternative limitation over, in the event of her dying without issue living at her death. *Taylor v. Taylor*, 565.
4. The testator, by a clause in his will, gave the residue of his personal estate to certain trustees named, and directed that it should be applied to support a hospital which was to be under such trustees' management. He also directed the trustees to apply to the legislature for an act to incorporate the hospital, and if the legislature should not, within two years after his death (provided the youngest trustee living at testator's decease, and testator's nephew, who was also named in the will, or either should so long live), grant a proper act of incorporation, the bequest was to be paid to the United States. *Held*, that the reasonable interpretation of the will is that the testator intended to limit a contingent future interest in the nature of an executory devise, the contingency depending upon the creation of a corporation by the legislature taking within the period allowed for the suspension of the ownership of property by the statute against perpetuities. *Burrill v. Boardman*, 694.
5. An executory bequest limited to the use of a corporation to be created within the period allowed for the vesting of future estates and interests is valid. *Id*
6. Such a bequest does not violate the statute of wills which prohibits devises to a corporation not expressly authorized to take by will. *Id*.

WITNESS.

See PRIVILEGED COMMUNICATIONS.

WORDS.

"Capital," see TRUSTS.

"Contained in," see INSURANCE.

"Dying without issue," see WILLS.

"Entry of a Foreclosure," see INSURANCE.

"Income," see TRUSTS.

"Relation," see HUSBAND AND WIFE.

"Shall die by Suicide," see INSURANCE.



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